(18,571.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 343.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, PLAINTIFF IN ERROR,

vs.

G. C. BUFORD.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 1, 1903.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twentieth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Continental National Bank of Memphis, Tennessee, was plaintiff in error, and G. C. Buford was defendant in error, which said transcript of record as printed pursuant to the stipulation of the parties for use of the court upon the hearing of said cause, is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the northern division of the eastern district of Arkansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the May term, 1901, thereof, between Continental National Bank of Memphis, Tenn., against G. C. Buford, a manifest error hath happened, to the great damage of the said Continental National Bank of Memphis, Tenn., as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein gi' en, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 12th day of August 1901, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twelfth day of June in the year of our Lord one thousand nine hundred and one. Issued at office in the city of Batesville, with the seal of the circuit court of the United States for the northern division of the eastern district of Arkansas, dated as aforesaid.

JOSEPH W. PARSE,
Clerk Circuit Court United States, Northern Division of the Eastern District of Arkansas.

Allowed by

JACOB TRIEBER, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Northern Division of the Eastern District of Arkansas, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Batesville, this 10th day of July, A. D. 1901.

[Seal of the Circuit Court, Northern Division, East. Dist. Arkansas.]

JOSEPH W. PARSE,
Clerk of said Court.

No. 3. United States circuit court, northern division of the eastern district of Arkansas. Continental Nat. Bank of Memphis, Tenn., *vs.* G. C. Buford. Writ of error. To the circuit court of the United States for the northern division of the eastern district of Arkansas. Filed 12 day of June, 1901. Joseph W. Parse, clerk.

The United States of America to G. C. Buford, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern division of the eastern district of Arkansas, wherein The Continental National Bank of Memphis, Tennessee is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, judge of the circuit court of the United States for the eastern district of Arkansas, this 12th day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,
United States District Judge for the Eastern District of Arkansas.

No. —. United States circuit court, northern division of the eastern district of Arkansas. Continental Nat. Bank of Memphis, Tenn., *vs.* G. C. Buford. Citation.

3 In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, a Resident of Fulton County, Arkansas, Defendant.

Complaint at Law.

The plaintiff sues the defendant upon the cause of action hereinafter stated, as follows:

It shows that it is a banking corporation chartered and organized in 1890 under the national banking laws of the United States, with its office and place of business in the city of Memphis, Tennessee. That it is now in liquidation, having retired from the active business of banking in April 1899.

That the defendant is a resident of the town of Mammoth Springs, Fulton county, Arkansas.

That on October 20th, 1889, the Bank of Mammoth Springs, a corporation with its place of business at the town of Mammoth Springs, Fulton county, Arkansas, was organized and chartered, with defendant as one of its incorporators, and one of its first board of directors.

That defendant remained a member of the board of directors of said Bank of Mammoth Springs from its organization until its cessation of business in July, 1897, during which month said institution, having been utterly and wholly insolvent for some years, suspended business and passed into the hands of a receiver.

That on June 9th, 1891, defendant was elected president of said Bank of Mammoth Springs, and continued to hold that office from that date until June 9th, 1896.

That on September 6th, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of $2500.00, by note for that amount due November 8th, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being then indebted to plaintiff in

the sum of $1150.00 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date with interest from maturity at the rate of six per cent. per annum. A true copy of said *not* is herewith
4 filed as Exhibit "A" and the original will be produced on or before the hearing, or at any other time called for.

That on May 3rd, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of $5,000.00 by note, which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date with interest at the rate of six per cent. per annum. A true copy of said note is herewith filed, marked Exhibit "B," and the original will be produced on or before the hearing, or when called for. Said note is also entitled to further credits, as appears on the back thereof, amounting to $1592.75, leaving a balance due thereon of $1907.25, exclusive of interest. That in the years 1894 to 1897, inclusive, said bank was likewise indebted to plaintiff in various sums, at different times, due upon open account. That on June 30th, 1897, the balance due the plaintiff upon said account was $383.55, and in April 1898 when the last entry appears upon said account the balance was and now is, exclusive of interest, $2738.05. An itemized statement of said account from June 30th, 1897, is herewith filed as Exhibit "C."

Plaintiff therefore charges that said Bank of Mammoth Springs is justly indebted to it in the sums as hereinbefore stated, and that no part thereof has been paid except what is credited thereon. The said Bank of Mammoth Springs is wholly and totally insolvent, and its creditors can realize nothing on their debts.

The plaintiff was by the court appointing a receiver for said institution, denied the right to file its claim and participate in any distribution of assets that might be had, and that this denial was because of plaintiff holding certain collaterals, as shown on the face of the notes Exhibits "A" and "B" hereto.

Plaintiff states that said collaterals are wholly and totally worthless and can never be realized on.

That by section 1337 of Sandels & Hill's Digest of the Statutes of Arkansas, it is provided that:

"SEC. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: the amount of capital actually paid in; the cash value of its real estate; the cash value of its per-
5 sonal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

That by section 1346 of said Digest it is provided as follows:

"SEC. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly."

That by section 1347 of said Digest, it is provided as follows:

"SEC. 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

That said Bank of Mammoth Springs was incorporated and organized under the provisions of the law as set forth in sections 1326 to 1258 inclusive of said Digest, and therefore was subject to all of its terms.

That during the whole time of his incumbency of the office of president of said Bank of Mammoth Springs,—that is from June 9th, 1891, until June 9th, 1896,—when as above stated he ceased to be president of said bank—said defendant wholly neglected to comply with the provisions and perform the duties required of him by said sections 1337 & 1346, by making, swearing to and causing to be filed the statement or certificate required thereby.

Plaintiff therefore charges that said defendant is by reason of the foregoing facts, liable to it in this action, founded upon said statute, for the amount of the indebtedness due it by said Bank of Mammoth Springs as hereinbefore set out.

Wherefore, plaintiff prays judgment of the court against defendant, for the amount of its debt as hereinbefore set out, with interest, and for other relief.

RHEA P. CARY,
Attorney for Plaintiff.

6 STATE OF TENNESSEE, }
County of Shelby. }

H. L. Armstrong makes oath in due form of law, that he is cashier of the plaintiff bank, and that he believes the statements of the foregoing complaint are true.

H. L. ARMSTRONG.

Subscribed and sworn to before me, this the 20th day of July, 1900.

[L. S.]

W. T. AVERY,
Notary Public.

My commission expires, Oct. 20th, 1901.

Bank of Mammoth Springs, Mammoth Springs, Arkansas.

$1,150.00. MAMMOTH SPRINGS, ARK., *May* 20, 1897.

Three months after date, we promise to pay to the order of H. G. King, eleven hundred & fifty dollars, at Continental national bank, Memphis, Tenn., for value received, with 6 per cent. interest from maturity until paid, and attached hereto as collateral security, sundry collaterals.

(Signed) BANK OF MAMMOTH SPRINGS.
H. G. KING, *Pres't.*

No. — Due —

Exhibit "A."

On back:

Protest waived and payment guaranteed.
(Signed) H. C. KING.

$3,500.00. MAMMOTH SPRINGS, ARK., *May* 27, 1897.

Ninety days after date we promise to pay to the order of the Continental National Bank of Memphis, Tenn., thirty-five hundred dollars, for value received, negotiable and payable without defalcation or discount at the Continental National Bank of Memphis, Tenn., with interest at the rate of six per cent. per annum from —, having deposited or pledged with the Continental National Bank of Memphis, Tenn., as collateral security for the payment of this note sundry collateral.

Now in the event of the non-payment of this note at maturity, the holder hereof is hereby invested with full authority to use, transfer, hypothecate, sell or convey the said collaterals, or any collaterals substituted for or added to the above, or any part thereof or to cause the same to be done, at public or private sale, with or without notice or demand of any sort, at such place and on such terms as the holder hereof may deem best, and the holder of this note is authorized to purchase said collaterals when sold for his own protection, and the proceeds of such sale, transfer or hypothecation shall be applied to the payment of this note, together with all protest, damages, in
7 terests, costs and charges due upon the note, or incurred by reason of its non-payment when due, or in the execution of this power. The surplus if any after payment of this note, together with all charges above stated, shall be paid to the drawer of this note, or at the election of the holder hereof be paid on any other obligation of the drawer hereof, whether as principal debtor or otherwise, held by the holder hereof, and if the proceeds of the above sale shall not be sufficient to pay this note, the drawer hereof agrees to make good (and) deficit. In case of depreciation in the market value of any security pledge, for this obligation, we hereby agree to deposit on demand, a further amount of collateral so that the market value shall always be at least ten per cent. more than the amount of this note, and failing to deposit such additional security, this note

shall be deemed to be due, and payable forthwith anything hereinbefore expressed to the contrary notwithstanding, and the holder may immediately reimburse himself by the sale of the security. It is further agreed that if at any time prior to maturity or payment of this note the undersigned becomes, or is believed by said bank to be insolvent, said bank, if then the holder thereof, shall be entitled as further security for the payment of this note to a first lien upon any draft or bills receivable it may then hold for the collection for the account of the undersigned and upon any money then deposited with said bank to the credit of the undersigned, and may retain and apply such money and proceeds when collected of all such drafts or bills receivable to the payment of this note.

(Signed) BANK OF MAMMOTH SPRINGS,
By H. G. KING, *Pres't*,
By GEO. READ, *Cashier*.

Exhibit "B."

On back:

CREDIT.

Oct. 5, '97.	Cash from note W. H. Woods		$500.00
Dec. 7, '97.	Brick sold	11.87	
" "	C. H. Fawcett, paid	20.00	
			31.87
" 15, '97.	R. W. Soosetre, paid		55.00
Jan. 5, '98.	Brick sold		30.00
Jan. 26, '98.	" "		50.00
Feb. 4, '98.	" "		27.50
" 14, '98.	Shays Co., warrant sold		287.50
Mar. 12, '98.	Brick sold		15.50
" 31, '98.	Bal. brick sold		595.38
	Total credits		$1,592.75

8 Bank of Mammoth Springs, Mammoth Springs, Arks., in account with Continental National Bank, Memphis, Tenn.

DEBIT.			CREDIT.		
1897.			1897.		
July 1.	R	1 95.	June 30.	By am't balance as per statement	383.55.
	10402	500.00.	July 1.	C. L. 30th	52.70.
		501.95.		1. "	52.54.
2.	R	6.			105.24.
	10412	14.50.		2. 1st	129.36.
	L. R. ret'd & fees	28.98.		3. 2nd	138.89.
		49.48.		6. 3	27.99.
6.	10404	62.65.		5	434.29.
	5	43.50.			462.28.
	6	64.80.		8. 7	213.34.
	7	5.94.		10. 9	754.24.
		176.89.		12. 10	1218.75.
7.	Rem. to Western B	100.		13. 12	173.83.
	10411	12.35.		14. Mer. bk. held	51.88.
	2	99.75.		C. L. 13	355.16.
	3	11.58.			407.04.
	8	25.50.		15. 14	1155.84.
	20	6.65.		16. Dep. by R. P. Lake	683.
	R	56.52.		C. L. 15	200.78.
		312.35.			883.78.
8.	10408	182.79.		17. 16	191.34.
	19	97.95.		19. 17	294.97.
		280.74.		17	998.00.
9.	10414	150.			1292.97.
	5	151.40.		20. Mer. held	36.30.
	22	1.40.		" "	24.75.
		302.80.		19	110.30.
10.	10409	26.55.			171.35.
	10	73.95.		21. C. L. 20	606.50.
	31	10.11.			690.87.
	2	11.41.			1297.37.
	3	5.10.		22. Mer. bk. paid	30.70.
	5	49.85.		24. Harrison Ark	875
	6	25.31		Less cost	120 7.55.
	8	33.84.		27. Our rem. 7-21	50.60.
	41	8.31.			
	2	53.93.		For'd	9068.02.
	4	2.90.			
	5	3.30.			
	6	17.65.			
		322.19.			
12.	10423	150.			
	4	500.			
	6	13.73.			
	7	21.13.			
	8	360.00.			
	9	109.50.			
	30	8.			
	4	133.60.			
	7	21.95.			
	40	191.82.			
	3	18.55.			
	9	7.			
	R	5.			
		1656.38.			
13.	Mer. bk. to notary	51.88.			
	10425	7.40.			
	8	46.13.			
	R	16.13.			
		121.54.			
9					
14.	Our rem	13.30.			
	R	9.25.			
		22.55.			
15.	10447	201.71.			
	53	50.09.			
	Guthrie 7-10 ret'd protested & fees	451.50.			
	R	10.00.			
		713.30.			
	For'd	4460.17.			

Exhibit "C."

(Account continued.)

DEBIT.			CREDIT.	
1897.			1897.	
Amount forwarded		4460.17.	July 27. By am't for'd	9068.02.
July 16. 10459	98.37.		1898.	
60	25.70.		April 14. Balance	2738.05.
6	30.10.			
R	178.38.			
		332.55.		
17. 10461	4.15.			
3	149.75.			
4	31.30.			
		185.20.		
19. 10454	1919.10.			
8	692.51.			
62	24.85.			
5	26.26.			
3552	3.00.			
R	29.16.			
Mer. bk. ref.	24.75.			
" " "	36.30.			
		2756.27.		
20. 10450	2.85.			
1	9.85.			
13	12.10.			
4	39.34.			
R	163.90.			
		228.04.		
21. Mer. bk. unpaid	30.70.			
10475	583.30.			
6	39.54.			
80	366.74.			
1	111.82.			
2	2.65.			
6	38.68.			
93	15.15.			
4	29.85.			
6	149.70.			
7	29.87.			
R	50.60.			
		1439.60.		
22. West Plains 7-19, ret'd	1000.00.			
R 7-19	5.00.			
		1005.00.		
26. K. C. 7-20 ret'd	500.00.			
fees	2.50.			
		502.50.		
27. Pipestone mine refused		840.00.		
1898.				
Jan. 22. P'd rent to K. C. Ft. & M. R. R.		5.00.		
Apr. 14. P'd M. Imp. & W. P. Co.		51.75.		
		11806.07.		11806.07.
April 28. To balance		2738.05.		

10 The foregoing complaint, and Exhibit- "A," "B" and "C" are endorsed on the back as follows:

The Continental National Bank, of Memphis, Tenn., *vs.* G. C. Buford. No. 33. Complaint at law. Filed in my office July 21, 1900. Joseph W. Parse, clerk.

Summons. Issued July 21, 1900.

The President of the United States of America to the marshal of the eastern district of Arkansas, Greeting:

You are hereby commanded to summon G. C. Buford of Mammoth Springs, Fulton county, Arkansas, a citizen of the State of Arkansas, if to be found in your district, to appear before the judges of the circuit court of the United States, in the eighth circuit for the

eastern district of Arkansas, at Batesville, Arkansas, in said district on the second Monday in December next, A. D. 1900, then and there to answer the Continental National Bank of Memphis, Tenn., a corporation under the national banking laws of the United States, in a plea of debt to the damage of said plaintiffs (as they say) fifty-seven hundred and ninety-five and $\frac{30}{100}$ dollars and interest ($5795.30).

Hereof fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Batesville, this 21st day of July, A. D., 1900, and the 125th year of American Independence.

[L. S.] JOSEPH W. PARSE, *Clerk.*

I have executed the within writ by delivering a true copy of the same into the hands of G. C. Buford, at Mammoth Springs, on August 7th, 1900, as within I am commanded.

HENRY M. COOPER,
U. S. Marshal,
By JAMES F. HUDDLESTON,
Deputy U. S. Marshal.

Marshal's fees $5.96.

Indorsed on back: U. S. circuit court, northern division, eastern district of Arkansas. No. 23. Continental National Bank of Memphis *vs.* G. C. Buford. Summons issued July 21, 1900. Returnable Dec. term, 1900. Filed in my office Aug. 17th, 1900. Joseph W. Parse, clerk.

11 In the District Court of the United States, Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, Defendant.

The defendant demurs to the complaint of the plaintiff for insufficiency, and for cause of demurrer says:

1st.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of two years.

2nd.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of three years.

3rd.

That said complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contracted.

4th.

That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest.

5th.

Because said complaint does not state facts sufficient to constitute a cause of action.

DAVIDSON & MEEKS,
Attorneys for Defendant.

On the back: Continental National Bank *vs.* G. C. Buford. No. 33. Demurrer. Filed Dec. 10th, 1900. Joseph W. Parse, clerk.

Order Designating Judge to Hold Court.

UNITED STATES OF AMERICA, }
Eighth Circuit. }

In my judgment the public interests require the designation and appointment of a district judge of this court to hold and assist in holding the circuit and district courts of the United States for the eastern district of Arkansas in place or in aid of the district judge of that district:

I do, therefore, by these presents, designate and appoint the Honorable John H. Rogers, United States district judge for
12 the western district of Arkansas, to hold or assist in holding the district and circuit courts of the United States in and for the several divisions of the eastern district of Arkansas at the times and places appointed by law for holding said courts from September 10th, 1900, until January 1st, 1901, in place or in aid of the Honorable Jacob Trieber, United States district judge for the said eastern district of Arkansas.

Witness my hand this 10th day of September, A. D. 1900.

WALTER H. SANBORN,
Circuit Judge.

Be it remembered, that on the 10th day of December, 1900, A. D., the same being the second Monday in December, the day fixed by law for the convening of the circuit court of the United States for the northern division of the eastern district of Arkansas, said court met in the United States court-room at Batesville, the place designated by law, the Hon. John H. Rogers, judge of the United States for the western district of Arkansas, presiding, none of the other judges of the eighth circuit being present; also being present Henry M. Cooper, marshal of the United States for the eastern district of Arkansas, and Joseph W. Parse, clerk of said court present. When after due proclamation court was opened and the following proceedings, had:

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN.,
vs.
G. C. BUFORD. } No. 33.

Now on this day comes the defendant and through his attorneys, Davidson & Meeks, files his demurrer herein.

TUESDAY, *December 11th, A. D.* 1900.

Hon. John H. Rogers, judge, presiding.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN.,
vs.
G. C. BUFORD. } No. 33.

On this day comes the plaintiff by Rhea P. Cary, its attorney, and also the defendant by Davidson & Meeks, his attorneys, and the demurrer heretofore filed by the defendant to the plaintiff's complaint herein, was presented to the court, and after argument of counsel for the plaintiff as well as for the said defendant, the court doth take the matters of law arising on said demurrer under advisement and withholds a decision thereon for the present.

* * * * * * *

(Here follow the briefs of the plaintiff and defendant filed in the court below which are omitted by stipulation of the parties.)

13 STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered, that at a term of the supreme court of the State of Arkansas, begun and held on the 29th day, being the fourth Monday of May, A. D. 1900, at the court-house in the city of Little Rock, the following opinion was delivered by the court in the case of

NEBRASKA NATIONAL BANK, Appellant,
vs.
H. J. WALSH, Adm'r.

Appeal from Pulaski circuit court.

Opinion. Filed November 17th, 1900.

The statement and opinion in full follows:

Statement.

This is an action by appellant against appellee for the statutory liability arising upon the following sections of the Digest:

"SECTION 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first Monday of January or July next preceeding the time of making such certificate,

in the following particulars, viz: The amount of capital actually paid in, the cash value of its real estate, the cash value of its personal estate, the cash value of its credits, the amount of its debts, the name and number of shares of each stockholder, which certificate shall be deposited on or before the 15th day of February or August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SECTION 1346. The certificate required by sections 1334, 1337, 1343 and 1344, except the certificate of transfer of stock, shall be made under oath or affirmation by the person subscribing the same, and if any person knowingly shall swear or affirm falsely as to any material facts he shall be deemed guilty of perjury, and be punished accordingly.

"SECTION 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of (ant) such neglect or refusal."

14 The defendant pleaded the statute of limitations. The case was tried before the court, which upon the evidence made the following finding:

"The court finds the facts as follows: The Southern Stave and Lumber Company was a corporation organized under the law of Arkansas, November 3rd, 1890. H. J. Walsh, the defendant, was president thereof till May 23, 1895. January 26, 1893, the Southern Stave and Lumber Company made its note of $10,000.00 to the Western Manufacturing Company, due May 29, 1893, which was before maturity duly transferred to plaintiff bank, March 29, 1893, Western Manufacturing Company made its note to plaintiff bank for $10,000.00, due August 1, 1893, and assigned to it as collateral security the note of Southern Stave and Lumber Company for $13,002.70, executed to said Western Manufacturing Company on the 4th day of March, 1893, due October 7th, 1893. None of these notes have been paid, but have been renewed from time to time, and the debts then created are represented by the notes in suit. The first certificate ever filed by the president as called for by section 1337 of Sandels & Hill's Digest was filed March 15, 1893, in the court-house of Pulaski county, Ark., the domicile of the corporation, and was not supported by affidavit, but contained only the certificate of the notary that it had been acknowledged as signed by the president and secretary. This suit was filed January 13, 1896, and a writ then issued, more (then) two years after the right of action accrued.

Finding of Law.

"On this state of facts the defendant became liable to the plaintiff for the debts sued on, which had their inception during the time of his default in filing his certificate.

"But the causes of action are barred by the statute of limitations

of two years, pleaded by the defendant, and the defendant is entitled to judgment and it is so ordered."

Judgment was entered accordingly, and this appeal duly prosecuted.

Opinion.

The statute upon which this action was founded does not come within the scope of the statute of limitations of two years. That statute is as follows:

"All actions upon penal statutes, where the penalty or any part thereof, goes to the State or any county or person suing for the same, shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

15 First. The prime object of making statutes strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them, and in statutes primarily and properly penal, the provision for punishment now rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from like offenses. It would therefore be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duty enjoined —it were ignored. Black's Law Dic., Penal Statutes, "Penal Laws," Bonner's Law Dic. "Penal Statutes," Potter's Diaries on Statutes and Constitution, 74. Reassured by these simple but infallable tests, the statute upon which this action is based is not penal. Here the behest of the law may be ignored repeatedly by the officers failing to *the* file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had debts contracted with the corporation during the period of such disobedience, and even then the officers could be made to pay only at the instance of these creditors and not by them if the debts had already been paid by the corporation. This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute and that punishment of the officers for failure to perform the duties it prescribed is not the dominant idea.

The duty which the statute enjoins upon, and the liability which it creates against the officers, is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, for compensation and indemnity, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result directly or indirectly from their negligence or failure. "By the principles of the common law," says Judge Thompson, "all men are answerable out of their estates for

the debts which they contract by themselves or their agents. Now, when the legislature says that the managing officers of a corporation shall not enjoy this granted immunity, provided they fail to make and publish certain reports to apprise the public of its financial condition, it is no more than to say to them that these things which it requires of them are conditions precedent upon which alone
16 they shall enjoy this granted immunity." Third Thompson Corp., sec. 4164; Nat. New Haven Bank *vs.* North Western Guaranty Loan Co., 61 Minn., 375. The liabilities created and the remedies provided by this statute are private and civil. There is nothing in the mere wording to give it even a penal semblance, which of itself, is persuasive. We conclude, from these considerations, that the statute is not penal, but highly remedial, even when construed independent of the statute of limitations. Second. But when viewed as we must view it here, in connection with that statute, the correctness of that conclusion seem- all the more obvious. The statute of limitations was modeled after the 31st of Eliz., chapter 5, section 5. According to the familiar rule which we have often followed, where a statute is borrowed from another jurisprudence where it has received definite construction, it is taken with the construction which had there been placed upon it. Up to 1838, when our statute of limitation was passed, penal statutes in England were limited to actions brought either for the Government by the public prosecutor, or to *qui tam* actions, brought not by the party injured or ag-rieved, but by any one else who prosecuted both for himself and the Queen—the common informer. *Qui tam pro domino Rege, quam pro se ipso in hac parte sequiter.*

But statutes which gave the remedy to the party aggrieved were never regarded as penal, but as remedial, even though such party might have been given damages beyond indemnity, or mere compensation:

Woodgate *vs.* Katchbull, 2 Tenn. Rep., 148.
Word *vs.* Snell, 1 Hy. Blackst., 10.
Bones *vs.* Booth, 2 W. Blackst., 1226.

But whether our statute was borrowed from England or not, it is very similar to 31st of Eliz., and the distinction *supra* between penal and remedial statutes under it was correct then, and under peculiar wording of our statute it is correct now. For, in our opinion, the phrascology of our statute indicates that the legislature had in mind only those statutes which imposed a pecuniary mulct for the doing or not doing of some act commanded or forbidden by the law for the benefit of the public and for which pardon might be granted, and for which the Government alone its designated agent or the common informer might bring an action. In other words, penal statutes, in the strict and proper sense, are not statutes creating private rights and remedies. The words "or other persons" mean simply any other person who sues as a common informer, and not having a special injury by reason of injury or grievance. The words "or cause of action shall have accrued" refer to those numerous
17 statutes where the cause of action does not accrue to the State or county until the common informer has been given an

opportunity to sue for the penalty or *vice versa*, or to cases where an opportunity is given to the offender to make compensation or restitution before he can be proceeded against. In all such cases, the cause of action accrues, of course, after the commission of the offense.

We are aware that there is quite an array of respectable authority holding that statutes similar to the one sued on here are penal and subject to the statutes of limitations for suits based upon penal statutes.

(See brief of counsel for appellee.)

Much depends, of course, upon the language of the respective statutes, as to the construction to be given them and the correct applications of the decisions construing them. Many New York cases are cited as authority for holding our statute penal. The New York limitation statute is as follows: "An action upon a statute for a penalty or forfeiture, when the action is given to the person aggrieved, or to the person and the people of the State, except where the statute imposing it prescribes a different limitation, shall be brought within the three years." Other cases based on statutes embodying similar language are cited. We do not consider cases based upon such statutes as in conflict with the view we have expressed, it matters not in what language the opinion may be couched. For the words " when the action is given to the person aggrieved " may have been considered by the court as tantamount to a legislative determination that actions by aggrieved parties to recover on statutes similar to ours were penal. With due deference to all authorities which hold that statutes similar to ours are penal, we are constrained to believe that such views are erroneous, and we fully agree with Mr. Morawetz that " it is not quite clear what the courts mean to express by saying that statutes of this character are penal and that they impose upon the directors a penal liability." 2 Mor. Corp. sec. 908.

That opinion is unusually clear and says what is expressed by the supreme court of Georgia, in the early case of Neal *vs.* Moultrie, 12 Ga. 116: Thomp. Cor.——

The opinion is unusually clear and strong. The following authorities also support the view we have taken:

Goodridge *vs.* Rogers, 22 Pick. 495.
Adams *vs.* Palmer, 6 Gray, 338.
Norfolk *vs.* Anur Steam Gas Co., 103 Mass., 160–162.
Nickerson *vs.* Wheeler, 118 Mass., 298.
18 Davidson *vs.* Rankin, 34 Cal. 505.
Mokelunne *vs.* Woodberry, 14 Cal. 265.
Cady *vs.* Sandford, 53 Vt. 632.
Seely *vs.* Smith, 45 N. W. 922.
Stanley *vs.* Wharton, 9 Price 301.
Marathon Bank *vs.* Jones, 47 N. W., 208.
Wolverton *vs.* Taylor, 23 N. E., 1007.
Fitzgerald *vs.* Weidenback, 76 Fed. Rep. 695.
Huntington *vs.* Aetvill, 146 U. S., 567.

The decision in the last case was put upon the ground that the statute under consideration was not penal in the international sense; (atill,) what is said in the opinion evidently supports the view we have expressed. The authorities above cited are all found in the brief of counsel for the appellant, and we may say in this connection that it would be a work of supererogation to attempt to go beyond the reasoning and research of the most excellent briefs of counsel on both sides. They seem to have exhausted the subject. We have agreed with the counsel for appellee, and this opinion couched in my own language, reflects, in the main, though in a less forceful and attractive form, the arguments they have presented.

Having reached the conclusion that this is a statutory liability and not a penalty, the statute of limitations would be that applicable to "all actions founded upon any contract, or liability, expressed or implied, not in writing." Sec. 4822, Dig. Rev. Stat. chap. 91, sec. 6. For before the forms of action were abolished, debt was the proper action for enforcing a statutory liability of the kind under consideration.

Lewis *vs.* Stein, 16 Ala. 214.
Ballard *vs.* Bell, 1 Mason, 243.
Stockwell *vs.* United States, 13 Wall., 531.
Chaffee *vs.* United States, 18 Wall., 516.
Cross *vs.* United States, 1 Gall., 26.
Reed *vs.* Davis, 8 Pick., 514.
Rockwell *vs.* State, 11 Ohio, 130.
Blackburn *vs.* Baker, 7 Port, 284.
Strange *vs.* Powell, 15 Ala., 452.
Kelly *vs.* Davis, 1 Head, 284, 18 Am. & E. Ency. Law, 274; Wood on Limitations, sec. 25.

The finding of facts by the court being correct there is no reason for sending the cause back for a retrial. The judgment of
19 the circuit court is reversed for the error in finding the action barred by the two years' statute of limitations and judgment is entered here for the appellant.

In testimony that the above is a true copy of the opinion of the supreme court, in the case therein stated, I, P. D. English, clerk of said court, hereto set my hand and affix the seal of said court at my office, in the city of Little Rock, this the 5th day of December, A. D. 1900.

[L. S.]

P. D. ENGLISH, *Clerk*,
By J. H. CAMPBELL, *D. C.*

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENN., Plaintiff,
vs.
G. C. BUFORD, Defendant.

ROGERS, *J.:*

This suit is a statutory proceeding, founded on sections 1337 and 1347 of Sandels & Hill's Digest of the Statutes of Arkansas, which reads as follows:

"SECTION 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder, which certificate shall be deposited on or before the 15th day of February or August, with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SECTION 1347. If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

No authority need be cited to establish so plain a proposition as that where a suit is founded on a statute the pleader must state a case clearly within its terms. The preliminary question, therefore, is to clearly understand the meaning of the statute. What does section 1337 of Sandels & Hill's Digest require of the president and secretary of domestic corporations in this State?

Answer:

First. To make a certificate.

Second. To make it *annually.*

Third. It must show the *condition* of the (*of the*) corporation in certain particular *specified in the statute* (and omitted here because not necessary to state them).

Fourth. The *condition* of the corporation required to be shown is its condition either "on the first Monday of January or July next before the time of making such certificate."

Fifth. If the certificate made shows the condition of the corporation on January 1st, next before it was made, it must be deposited with the county clerk on or before the 15th day of February next thereafter.

Sixth. If the certificate made shows the condition of the corporation on July 1st next before is was made, it must be deposited with

the county clerk on or before the 15th day of August next thereafter.

It is clear then, if this is a correct construction of that section, that the officers may elect whether in the certificate, they will show the condition of the corporation on January 1st or July 1st, provided always, in each year, when possible, one certificate must be made, but if they elect to make the certificate show the condition of the corporation on January 1st, it must be made and deposited with the county clerk on or before the 15th of February next thereafter; and if they elect to make the certificate show the condition of the corporation on July 1st, the certificate must be made and deposited on or before August 15th next thereafter. This is important, because when the time has expired in which the law requires the certificate to be made and deposited, the liability of the officers attaches; and all debts contracted between that time and the time the next certificate is required to be made and deposited they are personally liable for, and any person having such a debt may sue upon it at any time after the liability attaches. Difficulties will be found in applying this construction of the statute to supposable cases. They will be found, however, in any construction that may be placed upon it. The difficulties are inherent in the language of the statute. We know, however, that the certificate required is to be made "*annually*" and "*annually*" does not mean "twice in one year" but it means "yearly" or "once in each year." Holding on to this definition of the word "annually" it seems to me no other construction is possible without disregarding some parts of the section, which is not permissible so long as a construction is possible which will permit all to stand.

Now, let us turn to the complaint. In the first place, there
21 is not a single allegation in the complaint which informs us when either of the three debts sued for was "*contracted.*" But the officers of the Bank of Mammouth Springs are not personally liable for any debts of that bank, except such as were "contracted during the period of any such neglect or refusal" to make and deposit the required certificate. But it may be said the following allegation appears as to the first debt: "That on September 6, 1894, said Bank of Mammoth Springs *became indebted* to plaintiff in the sum of twenty-five hundred dollars, by note for that amount, due November 8, 1894." Assuming that the words "became indebted" are tantamount to "contracted," then how does plaintiff stand? It is alleged and must be taken as true, that the defendant became president of the Bank of Mammoth Springs on June 9, 1891, and continued president until June 9th, 1896, and never did make or deposit (and) of the required annual certificates. As to this debt, his last failure or refusal, before it was contracted occurred on August 15, 1894, and the failure or refusal continued until this debt was contracted. His liability for this debt, therefore, begun the moment it was contracted, and continued three years, which would be September, 1897.

This debt, therefore, is clearly barred by the three years' statute of limitations. Nebraska National Bank *vs.* Walsh, 68, Ark. If it be

said that debt was renewed from time to time, and the last note therefor executed on May 20, 1897, there are two answers: first, a renewal of a note is not the contraction of a debt. It is simply the execution of a new note as evidence of a debt previously contracted. Plaintiff's brief contains citations which, I think, conclusively establish this proposition. Secondly, if the execution of the renewal note of May 20, 1897, was the contraction of the debt within the meaning of the statute, then the answer is, defendant ceased to be president in June, 1896, and the times provided by the statute for making and depositing two certificates had occurred, after he ceased to be president, and before the note was executed.

What I have now said is applicable with even more force to the second note, for as to that there is no allegation as to when the debt was contracted, or any language tantamount thereto. The language is, the Bank of Mammoth Springs "was also indebted," etc. That allegation may be true, and yet the debt have been contracted ten years before. The same is true as to the open account. The allegations do not bring it within the terms of the statute. It does not appear that a single item of it was contracted while the defendant was president of the bank. The complaint, therefore, does not show any cause of action; and, if it did, it appears, affirmatively
22 that the debts are barred by the three years' statute of limitation.

The demurrer, therefore, should be sustained, with leave to amend.

JNO. H. ROGERS,
U. S. District Judge.

Be it remembered, that on the 27th day of May, A. D. 1901, the same being the fourth Monday in May, the day fixed by law for the convening of the circuit court of the United States for the northern division of the eastern district of Arkansas, said court met in the United States court-room at Batesville, the place designated by law, the Honorable Jacob Trieber, judge of the United States for the eastern district of Arkansas, presiding, none of the other judges of the eighth circuit being present.

Also being present Henry M. Cooper, marshal of the United States for the said district, and Joseph W. Parse, clerk of said court, present; when after due proclamation said court was opened and the following proceedings had:

WEDNESDAY, *May 29th, A. D.* 1901.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD. } No. 33.

On this day the court being well advised what order to make on the demurrer to the bill, filed by defendant and submitted to the court at the former term of this court, the court doth sustain the demurrer, and complainant declining to amend his bill, but electing to rest on said original bill, it is therefore ordered, adjudged and

decreed by the court, that the complainant's bill be dismissed, and that the defendant do have and recover of and from the complainant all his costs herein expended, for which execution may issue as at law.

JOHN H. ROGERS,
Judge by Assignment.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

Comes the plaintiff, The Continental National Bank, and says that on or about the 29th day of May, 1901, this court entered judgment herein in favor of defendant and against this plaintiff, sustaining the demurrer of said defendant, and dismissing plaintiff's
23 suit; that error was committed by the court in sustaining the demurrer and dismissing plaintiff's suit; all of which will more fully appear from the assignment of error which is filed with this petition.

Wherefore, plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the eighth circuit at St. Louis, for the correction of errors complained of, and that a transcript of the record herein may be sent to said circuit court of appeals.

RHEA P. CARY,
Attorney for Plaintiff.

Indorsed on back: Continental National Bank *vs.* G. C. Buford. Petition for writ of error. Filed June 11th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

The plaintiff, in connection with its petition for a writ of error herein, tenders the following assignment of errors to the action of the court upon the hearing of the demurrer of the defendant herein:

1st. The court erred in entering judgment in favor of the defendant and against the plaintiff, sustaining the demurrer of the defendant and dismissing the plaintiff's suit.

2nd. The court erred in holding that the action was barred by the statute of limitations of Arkansas of three years.

3rd. The court erred in not holding that the renewals of indebt-

edness sued on were but continuations of the same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

RHEA P. CARY,
Attorney for the Plaintiff.

Indorsed on back: Continental National Bank *vs.* G. C. Buford. Assignment of errors. Filed June 11th, 1901. Joseph W. Parse, clerk.

Know all men by these presents: That we, The Continental National Bank, of Memphis, Tenn., as principal, and J. S. Handford, as surety, are held and firmly bound unto G. C. Buford, in the full and just sum of three hundred dollars to be paid to the said G. C. Buford, his heirs, executors, administrators or assigns; to
24 which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 7th day of June, 1901.

Whereas, lately at the May term, 1901, of the circuit court of the United States for the northern division of the eastern district of Arkansas, in a suit pending in said court between The Continental National Bank, plaintiff, and G. C. Buford, defendant, judgment was rendered against the said Continental National Bank, plaintiff as aforesaid, and the said plaintiff, The Continental National Bank, has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, G. C. Buford, citing and admonishing him to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Mo., sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Continental National Bank shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its plea, then the above obligation shall be void, otherwise to remain in full force and virtue.

THE CONTINENTAL NATIONAL BANK
OF MEMPHIS, TENN.,
By RHEA P. CARY, *Attorney.*
J. S. HANDFORD, *Surety.*

Approved by
JACOB TRIEBER,
U. S. District Judge, Eastern (—) of Arkansas.

On back: Filed June 13th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

Now comes the plaintiff, by its attorney, and files herein its petition for a writ of error to the United States circuit court of appeals for the eighth circuit to be holden at St. Louis, together with its assignment of errors in such behalf, to review the judgment rendered herein on May 29th, 1901, the prayer of which said petition is hereby granted and the writ of error awarded upon plaintiff giving bond in the sum of $300.00, or paying said sum into the registry of this court, the former of which is accordingly done, and said writ of error will issue as prayed for, returnable in 60 days.

JACOB TRIEBER,
U. S. Judge, East. Dist. Arkansas.

25 Indorsed on back: Continental National Bank *vs.* G. C. Buford. Order of court granting writ of error. Filed June 13th, 1901. Joseph W. Parse, clerk.

In the Circuit Court of the United States, Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

As attorneys for G. C. Buford, the defendant herein, we acknowledge notice of appeal and service of copies of petition for writ of error, assignment of errors, and citation by this court.

DAVIDSON & MEEKS,
Attorneys for Defendant.

Indorsed on back as follows: "Continental National Bank *vs.* G. C. Buford. Acknowledgment of service of copies and notice of appeal. Filed in my office, June 23rd, 1901. Joseph W. Parse, clerk."

In the Circuit Court of the United States for the Northern Division of the Eastern District of Arkansas.

CONTINENTAL NATIONAL BANK, Plaintiff,
vs.
G. C. BUFORD, Defendant. } No. 33.

I, Joseph W. Parse, clerk of the circuit court of the United States of America, of the eighth judicial circuit, in and for the northern division of the eastern district of Arkansas, do hereby certify the foregoing forty-nine pages, numbered from 1 to 49 inclusive, to be a full

true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $23.50, and that said amount was paid by Rhea P. Cary, attorney for plaintiff in error.

The Seal of the Circuit Court, U. S. A., Northern Division of East. Dist., Ark.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this 26th day of June A. D. 1901.

JOSEPH W. PARSE,
Clerk United States Circuit Court, Northern Division, Eastern District of Arkansas.

(Cancelled 10c. U. S. rev. stamp.)

Filed Jul- 20, 1901.

JOHN D. JORDAN, *Clerk.*

26 (*Appearance for Plaintiff in Error.*)

And on the twentieth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

CONTINENTAL NATIONAL BANK OF MEMPHIS, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

The clerk will enter my appearance as counsel for the plaintiff in error.

RHEA P. CARY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Appearance. Filed Jul- 20- 1901, John D. Jordan, clerk. Rhea P. Cary, Memphis, Tenn., counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the thirteenth day of August, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error,
vs.
G. C. BUFORD. } No. 1621.

The clerk will enter my appearance as counsel for the defendant in error.

ROBERT NEILL.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1621. The Continental National Bank, plaintiff in error, *vs.* G. C. Buford. Appearance. Filed August 13, 1901, John D. Jordan, clerk. Robert Neill, Batesville, Ark., counsel for def't in error.

27

(*Stipulation to Omit Briefs in Transcript of Record from Printed Record.*)

And on the thirteenth day of August, A. D. 1901, a stipulation to omit briefs in transcript of record from printed record was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

CONTINENTAL NATIONAL BANK OF MEMPHIS
vs.
G. C. BUFORD. } #1621.

In this cause, it is hereby stipulated and agreed between counsel for both parties hereto, that the clerk of this court in printing the record of this cause, may, and he is hereby, authorized to omit from the printed record, the briefs of counsel used in the lower court, and certified in the record by the clerk of that court.

RHEA P. CARY,
Attorney for Plaintiff in Error.
DAVIDSON & MEEKS,
ROBERT NEILL,
Attorneys for Defendant in Error.

(Endorsed:) No. 1621. Continental National Bank, pl'ff in error, *vs.* G. C. Buford. Stipulation to omit briefs in transcript of record from printed record. Filed Aug. 13, 1901, John D. Jordan, clerk.

(*Argument Commenced.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an entry in said cause, in the words and figures following, to wit:

28 United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Rhea P. Cary in behalf of the plaintiff in error; but the argument not having been concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the eighth day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

WEDNESDAY, *January* 8, 1902.

CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error, *vs.* G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called this day to be further heard, argument was continued by Mr. Rhea P. Cary for plaintiff in error and by Mr. Robert Neill for the defendant in error and concluded by Mr. Rhea P. Cary for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

29 (*Opinion.*)

And on the twelfth day of March, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, towit:

30 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CONTINENTAL NATIONAL BANK of Memphis, Tennessee, Plaintiff in Error,
vs.
G. C. BUFORD, Defendant in Error.

No. 1621. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. Rhea P. Cary for the plaintiff in error.

Mr. Robert Neill (Messrs. Davidson & Meeks were with him on the brief) for the defendant in error.

Before Caldwell, Sanborn and Thayer, circuit judges.

Statement.

The Bank of Mammoth Springs was an Arkansas corporation located at Mammoth Springs in that State. On the 9th day of June, 1891, G. C. Buford, the defendant in error and defendant below, was elected president of the bank and continued to be such until the 9th day of June, 1896. A statute of Arkansas under which the bank was organized and which was in force during the period mentioned contains the following provisions:

"SEC. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in: the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificates shall be deposited on or before the 15th day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"SEC. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"SEC. 1347. If the president and secretary of any such corpora-

tion shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such cor-
31 poration contracted during the period of such neglect or refusal." Sandels & Hill's Digest of the Statutes of Arkansas.

This action was commenced July 21st, 1900. The complaint alleges that during the whole time the defendant was president of the bank he neglected to comply with the requirements of the foregoing provisions of the statute by making, swearing to and depositing the certificate required thereby. It further alleges: "That on September 6th, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of $2500, by note for that amount due November 8th, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being then indebted to plaintiff in the sum of $1150.00 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date.

"That on May 3rd, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of $5,000.00 by note, which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date."

The defendant demurred to the complaint on the ground that it appeared on the face of the complaint that the cause of action was barred by the statute of limitations. The circuit court sustained the demurrer and the plaintiff declining to plead further final judgment was rendered for the defendant and the plaintiff sued out this writ of error. The opinion of the circuit court is reported in 107 Fed. Rep. 188.

CALDWELL, circuit judge, after stating the case as above, delivered the opinion of the court:

It is settled by the decision of the supreme court of Arkansas in the case of the *Nebraska National Bank v. Walsh*, 68 Ark. 21, that the statute on which this action is founded is a remedial statute and imposes "a statutory liability and not a penalty," and that the three years' statute of limitations applies to actions founded thereon. The single question left for our consideration is, When did the plaintiff's cause of action against the defendant accrue?

The contention of the plaintiff in error is that it did not accrue until the maturity of the last renewal notes; the contention of the defendant is that it accrued when the debts sued for were contracted, or at the furthest, on the maturity of the notes given at the time the indebtedness was created. The complaint does not disclose when the debts sued for were contracted, but they must have been contracted on or before May 3rd, 1894, and September 6th, 1894, the

respective dates at which the first notes mentioned in the complaint were executed.

As the action is barred whether the statute of limitations commenced to run from the creation of the debt or from the maturity of the notes given at its creation, it is not essential to the decision of the case to determine whether when the plaintiff made a loan to the Bank of Mammoth Springs or otherwise became its creditor for a present consideration on an agreed term of credit and took a note accordingly, the plaintiff could the next day have brought
32 suit for the amount of the debt against the defendant on his statutory liability to pay it as a debt of the bank "contracted during the period" of his neglect and refusal to file the required certificate.

Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety or guarantor. His liability was primary and not secondary. It was created by statute and was not contingent upon the failure or inability of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty and if he had been compelled to pay the debt he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank or to any proceedings against it to enforce payment.

At the time when the first renewal notes were taken the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action and so was the bank. These two rights of action in the plaintiff were not dependent. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in the opinion of Judge Folger in *Jones v. Barlow*, 62 N. Y. 202, 213, and have in substance adopted its reasoning; it seems to have been followed in later cases in that State (*Hardman v. Sage*, 124 N. Y. 25; *Parrott v. Colby*, 6 Hun. 55, affirmed on appeal in 71 N. Y. 597; *Jagger Iron Co. v. Walker*,

76 N. Y. 521) and elsewhere—*Mokelumme Hill Canal Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Ranken*, 34 Cal. 503; *Hyman v. Coleman*, 82 Cal. 650; *Young v. Rosenbaum*, 39 Cal. 646.

The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred and for that portion of the account contracted after he ceased to be president, he never was liable.

The judgment of the circuit court is *affirmed*.

Filed March 12, 1902.

33 (*Judgment.*)

And on the twelfth day of March A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

WEDNESDAY, *March* 12, 1902.

THE CONTINENTAL NATIONAL BANK OF MEMPHIS, TENNESSEE, Plaintiff in Error,
vs.
G. C. BUFORD. } No. 1621.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that G. C. Buford have and recover against the Continental National Bank of Memphis, Tennessee, the sum of twenty dollars for his costs herein and have execution therefor.

March 12, 1902.

(*Petition for Writ of Error.*)

And on the ninth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

34 Comes the plaintiff, The Continental National Bank and says, that on March 12, 1902, this court entered judgement herein in favor of defendant and against the plaintiff, affirming with costs the judgement of the lower court heretofore rendered herein; that error was committed by said court in so affirming said judgment of said circuit court, and in adjudging costs against this plaintiff, all of which will more fully appear from the assignment of errors, which is filed with this petition.

Wherefore said plaintiff, Continental National Bank prays that a writ or error may issue in this behalf to the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record herein may be sent to said Supreme Court of the United States.

RHEA P. CARY,
Att'y for Plaintiff.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Petition for writ of error. Filed May 9, 1902. John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the ninth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit, at St. Louis, Missouri.

CONTINENTAL NATIONAL BANK
vs.
G. C. BUFORD.

The plaintiff, Continental National Bank in connection with its petition for a writ of error, herein, tenders the following assignment of errors to the action of the circuit court of appeals upon the hearing of this cause in said court.

1. The court erred in entering judgement in favor of the defendant and against the plaintiff, affirming the judgement of the circuit court of the United States for the eastern district of Arkansas.
35 2. The court erred in adjudging the sum of $20.00 costs in favor of the defendant and against the plaintiff.
3. The court erred in holding that this action was barred by the statute of limitations of Arkansas of three years.
4. The court erred in not holding that the renewals of indebtedness sued on were but continuations of the same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

RHEA P. CARY,
Att'y for Plaintiff.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Assignment of errors. Filed May 9, 1902. John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the ninth day of May, A. D. 1902, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

Know all men by these presents, that we The Continental National Bank of Memphis as principal, and H. L. Armstrong and —— ——, as sureties, are held and firmly bound unto G. C. Buford in the full and just sum of three hundred ($300.00) dollars, to be paid to the said G. C. Buford, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of April, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the United States circuit court of appeals for the eighth circuit, being the December term, 1901, in a suit depending in said court, between The Continental National Bank of Memphis, as plaintiff and G. C. Buford as defendant a judgment was rendered against the said The Continental National Bank of Memphis and the said The Continental National Bank of
36 Memphis having obtained an order for a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said G. C. Buford citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The Continental National Bank of Memphis shall prosecute said writ of error to effect, and answer all damages and costs if it

fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CONTINENTAL NATIONAL BANK
OF MEMPHIS,
By RHEA P. CARY, *Its Attorney.* [SEAL.]
H. L. ARMSTRONG. [SEAL.]
W. P. HALLIDAY. [SEAL.]

Sealed and delivered in presence of

——— ———.

May 5, 1902.

Approved by
DAVID J. BREWER,
Associate Justice of the Supreme
Court of the United States.

I hereby certify that the sureties upon the foregoing bond are solvent and amply good for the penalty thereof.

JOHN B. CLOUGH, [SEAL.]
Clerk U. S. Circuit Court,
Western District of Tennessee.
DAN. F. ELLIOTTE, *D. C.*

This the 3rd day of May, A. D. 1902.

(Endorsed:) No. 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Bond on writ of error. Filed May 9, 1902. John D. Jordan, clerk.

(*Writ of Error.*)

And on the ninth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Continental National Bank of Memphis, Tennessee, plaintiff in error, and G. C. Buford, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 1621. Continental National Bank of Memphis, plaintiff in error, *vs.* G. C. Buford. Writ of error. Filed May 9, 1902. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this fifteenth day of May, A. D. 1902.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

38 (*Citation.*)

And on the ninth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

39 UNITED STATES OF AMERICA, *ss:*

To G. C. Buford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Continental National Bank of Memphis, Tennessee, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this fifth day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 1621. Continental National Bank of Memphis, Tenn., pl'ff in error, *vs.* G. C. Buford. Citation. Filed May 9, 1902. John D. Jordan, clerk.

40 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing forty pages contain a true copy of the portions of the transcript of the record printed pursuant to the stipulation of the parties and upon which record said cause was heard, and full, true and complete copies of all pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein The Continental National Bank of Memphis, Tennessee, was plaintiff in error, and G. C. Buford was defendant in error, No. 1621, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error with my return thereto and the original citation are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this fifteenth day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,571. U. S. C. C. of appeals, 8th circuit. Term No. 343. The Continental National Bank of Memphis, Tennessee, plaintiff in error, *vs.* G. C. Buford. Filed June 2nd, 1902.

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FILE COPY.

Office Supreme Court U. S.
FILED
MAY 22 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

CONTINENTAL NATIONAL BANK, OF MEMPHIS, TENN.,
PLAINTIFF IN ERROR,

vs.

G. C. BUFORD, DEFENDANT IN ERROR.

No. 249. 60

ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

RHEA P. CARY,
Attorney for Plaintiff in Error.

WILLS & CRUMPTON, PRINTERS, MEMPHIS.

IN THE SUPREME COURT OF THE UNITED STATES.

CONTINENTAL NATIONAL BANK, of Memphis, Tenn., Plaintiff in Error,

vs. No. 343.

G. C. BUFORD, Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes to this court upon a writ of error to the Circuit Court of Appeals for the Eighth Circuit. The complaint, filed in the lower court on July 21, 1900, prays judgment against the defendant in error for the amount of certain indebtedness held by it against the Bank of Mammoth Spring, Ark., and set out fully in the complaint. The action is founded upon Sections 1337, 1346 and 1347 of Sandels and Hill's Digest of the Statutes of Arkansas, which read as follows:

"Section 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day February or of August with the County Court Clerk of the county in which said corporation transacts its business, who shall record the same at length in a book kept by him for that purpose.

"Section 1346. The certificates required by Sections 1334, 1337, 1343 and 1344, except certificates of transfers

of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"Section 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of Section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

The complaint avers that the defendant in error was president of the Bank of Mammoth Spring from June 6, 1891, to June 9, 1896, continuously (Record, p. 3), and that during the whole time of his incumbency of the office, he wholly neglected to comply with the provisions and perform the duties required of him by said Sections 1337 and 1346, by making, swearing to and causing to be filed the statement or certificate required. (Record, p. 6.)

It is averred in the complaint that "on September 6, 1894, said Bank of Mammoth Spring became indebted to plaintiff in the sum of $2,500, by note for that amount due November 8, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20, 1897, when said Bank of Mammoth Spring, being then indebted to plaintiff in the sum of $1,150 as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after date with interest from maturity at the rate of 6 per cent. per annum."

Other indebtedness is averred in said complaint with particularity, but I deem it unnecessary to do more here than mention the fact.

Under this state of facts, a judgment was prayed against the defendant for the debt, interest and costs.

The Circuit Court sustained the demurrer of the defendant (Record, p. 21), and plaintiff took the case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where the judgment of the lower court was affirmed (Record, p. 30).

Thereupon the plaintiff filed its petition for writ of error to bring the case to this court, and the same having been allowed (Record, p. 33), the plaintiff tendered and now relies upon the

following assignment of errors, which I deem unnecessary to discuss seriatim, but will treat as a whole, because they raise questions so closely allied as to make separate treatment useless:

1. The court erred in entering judgment in favor of the defendant and against the plaintiff affirming the judgment of the Circuit Court of the United States for the Eastern District of Arkansas.

2. The court erred in adjudging the sum of $20 costs in favor of the defendant and against the plaintiff.

3. The Court erred in holding that the action was barred by the statute of limitations of Arkansas of three years.

4. The Court erred in not holding that the renewals of indebtedness sued on were but continuations of same debt, and that the statute of limitations did not begin to run until the maturity of the last renewal.

BRIEF AND ARGUMENT.

A demurrer was interposed by defendant which was subdivided into five sections. The first section states that the complaint shows the plaintiff's cause of action to be barred by the statute of limitations of two years. This is conclusively settled against the demurrant by the opinion in Nebraska Bank vs. Walsh (Record, pp. 12-17). where the Supreme Court of Arkansas holds the statute of three years to be the one applicable to this character of action.

The second section of the demurrer presents the vital questions in the case. It is that "the complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitations of three years." This section of the demurrer was sustained by the lower court in an opinion which is copied into the record (pp. 19-22), and is also reported in 107 Federal Rep., at page 188, et seq., and the opinion of the Court of Appeals appears in record at pages 28 to 30.

In the outset, it is probably well to determine the nature and character of this action, and of the liability which the statute under consideration imposes. The Supreme Court of Arkansas has held in the Walsh case, supra, that the action is *not a*

penal one. (Record, p. 17.) The nature of the liability imposed by the statute, and here sought to be enforced, is clearly and plainly shown in the case of Cady vs. Sanford, 53 Vermont, 632, where the Court was construing an act of the Vermont Legislature of 1860. Section 20 thereof provides "that if the president and directors of such corporation shall neglect or refuse to comply with the provisions of Section 14 (which required of them substantially the same thing as was required of the defendant in error by the statute under which this action was brought), they shall be personally liable, in an action on the statute, for all debts of such corporation contracted during the period of such neglect or refusal." The Court held that under this statute the liability of the directors "was wholly statutory, collateral to that of the company, neither greater or less in amount than the liability of the company."

Bouvier defines a collateral security as a "separate obligation attached to another contract to guaranty its performance."

1 Bouvier's Law Dictionary (Rawle's Revision), 348.

The word "collateral" is defined in 3 Am. & Eng. Ency. of Law, at p. 310, as "that which is by the side of, assists, co-operates with, is made or given in addition to some other thing *which is presented as the principal.*"

If a collateral security be as defined by Bouvier, supra, then it would seem to follow as a necessary and logical sequence, that a collateral liability is a secondary one, dependent for its enforcement upon a failure to discharge the primary or principal one.

The Court of Appeals held the liability a primary one, but cited no authority on the proposition (Record, p. 29). The following would seem to be sufficient to show that the liability is secondary and not primary.

In Tennessee the proposition is well settled that the liability of stockholders for corporate debts is a secondary one, and that creditors of the corporation must first look to the corporate assets.

Jackson vs. Meek, 87 Tenn., 69.

Albitztigui vs. Guadalupe, 92 Tenn., 603.

In the case of Powell vs. Oregonian R. R. Co. 3 L. R. A. 201, the court held "that the statute of limitations in favor of

a stockholder upon his liability for unpaid subscription did not begin to run until the creditor had exhausted his remedy against the corporation," thus showing conclusively that the liability is a secondary one.

"Even when not expressly provided by statute it is the rule, according to the weight of authority, that corporate creditors before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets."

1st Cook on Corporations, Sec. 219.

"The statutory liability of directors for debts contracted in excess of a certain amount is secondary and can be enforced only after execution returned unsatisfied against the corporation."

Auburn National Bank vs. Dillingham, 147 N. Y., 603.

Upon another theory, however, and independent of the Vermont case, I submit that the same result is reached. To demonstrate: The following language used by the Arkansas Supreme Court in the Walsh case, supra (Record, p. 14), establishes the character of the liability as one equivalent to an indemnity:

> "The duty which the statute enjoins upon, and the liability it creates against the officers, is in favor of creditors. The measure of the liability is the amount of the debts which the corporation has incurred. There is no arbitrary amount fixed as a pecuniary mulct against the officers for each failure to file the certificate required. The amount is fixed, *for compensation and indemnity*, at the actual amount due the creditors. No additional sum is allowed them against the officers. They are only required to pay to prevent a loss which would otherwise result directly or indirectly from their negligence or failure."

Indemnity is defined by Bouvier as "that which is given to a person to prevent his suffering damages." An indemnity contract is said, in 16 Am. & Eng. Ency. of Law (2d Ed.), 168, to be "an agreement between two parties whereby one agrees to indemnify and save harmless the other from loss or damage in connection with some particular transaction, or to protect him against liability to or the claim of a third person."

If an indemnity contract be as above defined in the Encyclopedia, then it seems reasonable to conclude that an indemnity liability is one which protects or saves harmless another from

loss or damage in connection with a particular transaction. The liability, of course, does not accrue until the loss or damage occurs, and, therefore, it is a secondary and not a primary one.

Upon still another principle, the same consequence must follow. The Arkansas Supreme Court, in the Walsh case, supra, says:

> "The prime object of making statutes strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them, and in statutes primarily and properly penal, the provision for punishment now rests in uncertainty, is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual or class of individuals or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from like offenses. It would therefore be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duty enjoined by it was ignored. ('Black's Law Dic. Penal Statutes.' 'Penal Laws;' Bonner's Law Dic., 'Penal Statutes;' Potter's Diaries on Statutes and Constitution, 74.) Reassured by these simple but infallible tests, the statutes upon which this action is based is not penal. *Here the behest of the law may be ignored repeatedly by the officers failing to file the certificate required, and still no unpleasant or severe consequences would be visited upon them unless there were creditors who had contracted with the corporation during the period of such disobedience, and even then the officers could be made to pay only at the instance of these creditors, and not by them if the debts had already been paid by the corporation.* This shows conclusively that the public in general is not one whit interested in the enforcement of the duties enjoined by this statute, and that the punishment of the officers for failure to perform the duties it prescribed is not the dominant idea."

This ought to be sufficient to show that the liability is a conditional one, one depending upon a contingency.

When these features are considered, it seems impossible to reach any other conclusion than that the liability is secondary, and cannot accure until the primary one has attached.

The nature of this action and of the liability created by it being determined, the next question is as to when the statute began to run. In his opinion (Record, p. 18), the Circuit Judge says that the defendant's liability began the moment the debt was contracted, and continued three years. I submit that this is manifest error, and for these reasons: It certainly continued until the statute of limitations extinguished it, and this could not be done until the statute had run for three years. The statute could not be put into operation until the maturity of the debt. Had the plaintiff sued the defendant on August 19, 1897 (the day before the first note sued on herein fell due), can it be doubted that a plea in abatement for prematurity of suit would have been sustained. In other words, can one person, made liable by statute for the debt of another, be required to pay it before maturity and before the party primarily liable has been afforded an opportunity to do so? Can any suit be maintained which has for its foundation an unmatured debt? The mere statement of the proposition is a refutation of it, and it is difficult to see how it could be contended otherwise.

The Court of Appeals declined to take the view of the Circuit Judge, but held that in any event the statute of limitations began to run at the maturity of the first notes. (Record, p. 29.)

The general rule is that "the statute of limitations begins to run from the time the plaintiff's cause of action accrues, unless some recognized exception postpones its operation. This rule is never questioned; the difficulty lies in determining when the cause of action is to be deemed as having accrued."

19 Am. & Eng. Ency. of Law (2d Ed.), 193.

We have already seen that the liability created by the statute under consideration is a conditional one, or one depending upon a contingency. Upon this point the Encyclopedia (Vol. 19, 2d Ed., p. 193) says: "The right of action on a claim depending on a contingency or condition does not accrue until the happening of the contingency or the fulfillment of the condition, and the statute does not begin to run until then."

In support of this principle I here quote in full the opinion of the New York Supreme Court in Jones vs. Barlow, 62 N. Y., 202:

> "Allen, J.: The appellant and his co-trustees of the American Seal-Lock Company, became liable for the debts of the corporation by reason of the failure of the corpora-

tion to make and file a report as required by law. There was a default in making such report in January, 1871. The entire indebtedness accrued and became due between May, 1871, and January, 1872, after the default in making the report had been made and filed.

"The trustees of the corporation became, and were from the time the debt was contracted, liable for its payment under the statute. (Laws of 1848, Chap. 40, Sec. 12.)

"The statute is, that upon the failure to make the report mentioned, 'all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made.'

"Their liability is co-extensive and concurrent with that of the corporation. It is subject to the same conditions and qualifications that attach to the original indebtedness and whatever would defeat or abate an action against the corporation will serve as a shield and defense to the trustees.

"If the debt of the corporation is qualified or payable in the future it does not become an absolute obligation or a debt payable in presenti, when sought to be enforced against the trustees. No penalty attaches for the default if there be no debt, it is the debt which under the statute gives the right of action and which is recovered. If there be no obligation giving a present right of action against the company, no debt or duty which may be presently demanded from the corporation, there is no debt or duty which can be demanded under the statute as a penalty against the trustees. The language is quite explicit and imposes the liability for the debts of the company: and there is no debt within the meaning of the statute if the day of payment has not arrived. The object of the statute was to give the creditors of the corporations, founded under it, security for the performance of the obligations and payment of the debts of the company. The creditor gets all the protection designed by the statute if he has a co-temporaneous and concurrent remedy against the defaulting trustees and the company. Although the obligation is wholly statutory and adjudged to be a penalty, it is in substance as it is in form, a remedy for the collection of the corporate debts. The act is penal as against the defaulting trustees, but is remedial in favor of the creditors. The liability of defaulting trustees is measured by the obligation of the company, and a discharge of the obligations of the company or a release of the debt, bar the action against the trustees. No action lies for any penalty independent of a debt due by the corporation; so, too, a recovery, against the trustees and a payment by them of the recovery operates to discharge the obligation of the company to the creditor, and bars an action at his

suit. The remedy against the company and the trustees are concurrent, but there can be but one satisfaction. Whether the trustees would be subrogated to the right of the creditor against the corporation, upon payment by them, will not be considered. The penalty is incurred by the default, but the liability to any individual creditor does not become absolute until a debt shall exist which is within the terms of the statute, and a default in payment has been made by the corporation. It would not be contended by anyone that for merchandise sold the corporation, upon an agreed credit, while the trustees are in default for not making the statutory report, an action would lie against the trustees at once, and before the expiration of the term of credit. The law does not vary the contract of the parties, or absolve either from its performance or an observance of its terms. In such cases there would be a liability, but it would be dormant, and not constitute a cause of action until the debt shall become due.

"If this be so, it follows, as a necessary sequence, that if, after the debt should become payable by the corporation, the right to demand payment and the cause of action against the corporation should, by the act and consent of the creditor, be suspended, the liability of the trustees, as the incident of the principal obligations would become suspended, pro tempore dormant, to be revived by a new default of the corporation. Whatever limitations and conditions attach to the corporate and primary obligations, whether attaching to it at its inception or growing out of subsequent lawful agreements of the parties, necessarily limit and qualify the liability of the trustees, which, as before said, although final in its character, as adjudged as founded upon the debt, can only be enforced by reason of its existence, and according to the terms annexed to it.

"The Merchants' Bank of New Haven vs. Bliss, 35 N. Y., 412, applies the short statute of limitations, prescribed to actions for penalties by Section 92 of the Code, to this class of actions, but it does not purport to define who are creditors authorized to sue, or from what time the statute begins to run. It can only commence to run from the time a cause of action accrues. It does not begin to run from the time of the default in making the report, else, upon a continued default of three years or more, no action would lie against the trustees for debts contracted after that time. Miller vs. White, 50 N. Y., 137, is only authority for the statement that a judgment against the corporation is not evidence of the existence of the debt as against the trustees. This does not militate against the claim of the appellant that the debt against the corporation, however it may be proved, must be actually due at the time of the commencement of the action against the trustees.

"The principle which is invoked, that the trustees are not, technically and conventionally, sureties of the corporation, and, therefore, are not discharged from their liability by dealings of the creditor with the primary debtor, does not aid the plaintiff. The liability may be collateral to the original undertaking and still not capable of being enforced, except at the time and upon the terms and conditions prescribed by the original and primary obligation. A sufficient reason would exist for not holding the trustees discharged by giving time to the principal, even if the strict relationship of surety existed. The act of extesion is the act of the trustees, and, regarding them as sureties, they have assented to it, and are, therefore, not discharged. (Wright vs. Storrs, 32 N. Y., 691). Upon the same principle, the act of extension being regarded, as it must, a transaction between the creditor and the trustees, it cannot be presumed that, the time of the original debt having been extended upon good consideration, either party contemplated that the trustees, thus arranging and agreeing, should be sued the next moment for the same debt. Such an action would be a breach of good faith, even if allowable by a strict interpretation of the act. But, I am of the opinion that the trustees are not liable to an action, except for debts actually due, and for which a present right of action exists against the corporation. It follows from these views, that the plaintiff was not entitled to recover, except for the sum actually due from the corporation at the time of the commencement of the action. This would exclude from the recovery of the three notes, two $629.26 each and one for $629.34, payable, respectively, in eight, nine and ten months from the date thereof, with interest thereon.

"The judgment must, therefore, be reversed, and a new trial granted, costs to abide event, unless the plaintiff stipulates to reduce the recovery by deducting from the judgment the sum of $1,187.86, and interest from June 6, 1872, to the 18th of March, 1874, amounting, in the aggregate, to $2,056.44; and, in case the plaintiff so stipulates, the judgment, as thus modified, is affirmed, without costs to either party in this court.

"All concur with *Allen, J., except Folger, J., dissenting.*

"The statute (of limitations) begins to run from the time the cause of action accrues in favor of the creditor, and not from the time of default on the part of the directors, as a failure to file a report."

Clark on Corporations, p. 611.

If this suit could not be maintained until the maturity of the

debt, then the sole question is, when did the debt sued on ma. ture? The contention of the plaintiff is that the debt matured August 20, 1897, less than three years before the filing of the complaint. If this contention be well founded, the decree of the lower court should be reversed.

Upon this point the Circuit Judge said: "If it be said that the debt was renewed from time to time, and the last note therefor executed on May 20, 1897, there are two answers: First, a renewal of a note is not the contraction of a debt. It is simply the execution of a note, as evidence of a debt previously contracted. Plaintiff's brief contains citations which, I think, conclusively establish this proposition. Secondly, if the execution of the renewal note of May 20, 1897, was the contraction of the debt within the meaning of the statute, then the answer is, defendant ceased to be president in June, 1896, and the times provided by the statute for making and depositing two certificates had occurred, after he ceased to be president, and before the note was executed."

The infirmity of this argument is best shown by this illsutration: Suppose the original note of September 6, 1894, had been made to mature three years after date, instead of on November 8, 1894. It would then have fallen due on September 6, 1897, and no action could have been maintained on it until that time. Had this suit been on that note, the only possible question would have been as to whether the statute of limitations began to run before the maturity of the debt, and this question, I apprehend, should be entitled to no consideration.

Then if the effect of repeated renewals is the same as if the original debt ran for the same length of time as covered by the renewals, an easy solution is at hand of any apparent difficulties in this case. If a renewal is but a continuation of the same debt, then several renewals cannot change it, and it necessarily follows that the effect is the same as if the original debt had been made to run over the same length of time covered by the renewals.

In the plaintiff's brief authorities were cited which the Circuit Judge, in sustaining the demurrer, says conclusively establish the proposition that the renewal of a note is not the contraction of a debt, and that successive renewals of a note are only evidences of the original indebtedness I assume that this is not disputed. Then the following conclusions are not to be avoided: That the indebtedness evidenced by the notes sued on was contracted during the defendant's incumbency as presi-

dent of the Bank of Mammoth Spring; that the plaintiff's right of action accrued on the day of the maturity of the note, which was August 20, 1897, which day was less than three years before the commencement of this suit.

The authorities which in the opinion of the lower court conclusively establish the proposition that the renewal of a note is not the contraction of a debt, and referred to in the last paragraph above, are here set out at length as follows:

> "To renew, in its popular sense, is to refresh, revive or rehabilitate an expiring or declining subject, but it is not appropriate to describe the making of a new contract, or the creation of a new existence."
>
> 20 Am. & Eng. Ency. of Law, 1034.

> "A note taken in renewal of a former note is not regarded as payment of it."
>
> 10 Am. & Eng. Ency. of Law, 876.

> "In order to make one instrument an extinguishment of another, the latter must be of higher dignity than the former, or must put the plaintiff in a better condition; neither of which is the case where a renewal is made. It benefits the maker by giving him a further day of payment, but does not place the plaintiff in a better condition than before."
>
> McGuire vs. Gadsby, 3 Call (Va.), 234.

It is a well-settled rule of the construction of pleadings, that demurrers are not favored, but that every intendment is in favor of the pleading demurred to. It is also settled that upon the hearing of a demurrer, every allegation of the complaint is to be taken as true. Applying these two rules to the case at bar, it would seem that the complaint averring that the indebtedness was "renewed" (not extinguished or discharged), should make it demurrer-proof.

> "The mere taking of one note in renewal of another, is not a satisfaction of the first."
>
> Gresham vs. Morrow, 40 Ga., 487.

> "The renewal of a note at the same rate of interest, is not a novation. Therefore, where a collateral to secure a note was placed in the hands of the creditor, and the note was renewed at the same rate of interest, and with the same parties, the debt was the same, and the collateral security remained as securing it."
>
> Partridge vs. Williams, 72 Ga., 807.

"Where a note or draft is taken in renewal of a former one the presumption of law will be that the new note is not a payment of the old one, as between the parties thereto, in the absence of anything showing a contrary intention."

Bank vs. Bornman, 124 Ill., 200.

"This Court has repeatedly recognized the rule, that an expressed agreement must be shown to establish the fact that the bill or note, of either the debtor or the third person, was taken by the creditor in payment of a pre-existing debt."

Brown vs. Olmstead, 50 Cal., 162.

"The giving of a promissory note in renewal of another, does not necessarily operate as a payment.

"In order to have that effect, it must be understood and intended by the parties."

Jansen vs. Grimshaw, 125 Ill., 468; 17 N. E., 850.

"As a general rule, a new note given in renewal of another one, will not be regarded as a satisfaction of the first, unless there is an expressed or implied agreement to that effect."

Chisholm vs. Williams, 128 Ill., 115; 28 N. E., 215.

The case of Hill vs. Marcy, 49 N. H., goes even further than is contended for by the plaintiff in this case. There the Court held, that, "the law is understood to be well settled in this State, that a negotiable promissory note, taken for and on account of the precedent debt, is not payment of that debt, unless it is so agreed by the parties; and the burden is upon the party asserting the fact of payment to prove it."

Again, in the case of Jones vs. Rider, 60 N. H., 452, the Supreme Court of that State held that "A note is not payment of a pre-existing debt, unless expressly so agreed."

"A promissory note of a debtor given in renewal, or in place of a similar in form, and by the same party, is not a discharge of the liability existing on the first note, although the latter is given up."

Bank vs. Morgan, 6 Hun., N. Y., 346.

"The renewal of notes from time to time in no way extinguishes the original debt; it is simply an extension of the time of payment, and a change as to the evidence of the debt."

Holland Tr. Co. vs. Waddell, 75 Hun., N. Y., 104.

"It is settled in this State by repeated decisions, that giving a note for an antecedent debt does not absolutely

pay the debt, unless it is given and received as payment, and that the burden is upon the debtor to show that it is so given and received."

Nightingale vs. Chafee, 11 R. I., 609.

"There is no ground for the position that the renewals must be regarded as a payment for the whole debt. The rule on that subject is, that a note, or other promise to pay, is never considered as payment of a precedent debt, unless there is a special agreement to that effect, or unless it actually produces payment, and the onus is upon the party alleging such payment, to prove it."

Bank vs. Gunhouse, 17 S. C., 489.

"Upon familiar principles, if a note is taken as an additional payment, or in renewal, and is not duly paid or discharged, the original debt revives; and this principle applies to every renewal, which is but a continuation of the same debt. Nor is it material, whether the note, or bill, be given for a precedent or co-temporary debt; in either instance it will operate as an extinguishment or payment, unless it be so accepted by the creditor. If not paid at maturity, the creditor may sue upon it, or upon the original cause of action."

Moses vs. Trice, 21 Gratt, Va., 556.

In the case of Bank vs. Jones, 10 Wash., 185, the lower court instructed the jury as follows: "When a bank takes a note, a new note in place of one which has become due and matured, the law presumes that a payment of the note; that presumption can be rebutted, however, by testimony showing a different agreement between the parties; but without any agreement, it is presumed to be a payment."

Upon appeal, the Supreme Court of Washington, held as follows: "Appellant claims that this was also error. Upon this question, the decisions are not harmonious, but we are inclined to the opinion that the great weight of authority is in favor of appellant's position, that payment is not presumed in such cases, but is a question of fact, depending upon the intention of the parties."

"The giving of a new note for an old one which has become due, the amount and maker of the two notes being the same, will not be treated as a payment or extinguishment of the old note, or the pre-existing debt, unless the parties so expressly agree; but it will be regarded merely as an extension of credit."

Bank vs. Goode, 21 W. Va., 455.

"The doctrine is well settled, both in Virginia and this State, that the giving of a new note for a previous one which has become due, will not be regarded as an absolute extinguishment or payment of the precedent note, or pre-existing debt; unless it is so expressly agreed, whether the new note was that of one previously bound, or of a stranger. (Dunlap vs. Shankin, 10 W. Va., 662; Feamster vs. Withrow, 12 Id., 611; Bentz vs. Basnett, Id., 772; Bank vs. Goode, 21 Id., 445, 465, and the cases therein cited.)"

Hess vs. Dille, 23 W. Va., 90.

"It is a mistaken idea of counsel that the giving of a promissory note by the debtor, operates as an absolute payment or extinguishment of the original debt, or changes its nature. This is not so. Unless the note is expressly given and accepted in satisfaction and discharge of the debt, it only suspends the remedy upon it during its currency, and upon its dishonor or non-payment if in the hands of the payee, it may be disregarded, and suit brought for the original indebtedness. Chitty on Contracts, p. 660."

Blunt vs. Walker et al., 11 Wis., 334.

"Where A and B executed a note on January 10, 1873, at four months, for $5,000, which was discounted by the Covington National Bank, and at its maturity, A, the principal gave his check upon that bank for the amount of the note and took it up, and A and B gave a new note which was discounted by the bank, and the proceeds placed to A's credit to pay the maturing note, and this transaction was repeated at intervals of four months until February 23, 1878, when the note in suit was executed, held that the debt created in January, 1873, had not been paid, and that these new notes were merely renewals."

Lee vs. Hollister, 5 Federal Rep., 752.

Wait on Fraudulent Conveyances, Section 89, says, in speaking of the rights of existing and subsequent creditors to set aside fraudulent conveyances: "A party loses no right by a change of securities, and the holder of a new note given in exchange for an old one, may attack a conveyance which is fraudulent as to the old note."

Surely this could not be if the old note were extinguished or discharged, and if the new note was a new, separate and distinct debt.

Trezevant vs. Terrell, 96 Tenn., 528, was a case where Trezevant's assignors were creditors of Terrell's several years back, and at the time of the alleged fraudulent conveyance, sought to be set aside. The form of the debt was subsequently changed,

and it was embraced in the notes sued on. The Court says: "The first ground of demurrer is, that the bill shows on its face that all the notes sued on are of a date subsequent to the date of the deed, and the alleged pre-existing debt being embraced in said notes, is thereby, also made a subsequent debt, and cannot affect the validity of the conveyance, in the absence of an allegation of fraud, which is not made in the bill. The contention of counsel for Mrs. Terrell is, that the alleged pre-existing debt of $9,563.64, had been mingled by the creditors with the large debt created after the conveyance, and that complainants are therefore subsequent creditors only. The Court thinks this contention is unsound. Mr. Bump, in his work on Fraudulent Conveyances, 2d Ed., p. 498, states the law on this subject as follows:

> "'The rights of a creditor, however, arise from the fact that a debt is due. Any change, therefore, of the evidence of the existence of a debt, does not exert any influence upon those rights. Evidence may be introduced to show that a judgment is founded upon a prior claim. A note may be shown to be given for a prior account, or in renewal of a prior note. A novation does not affect the rights under the debt.' The author states, however, 'that a renewal by which a liability is created different from that created by the original debt, is a new debt.'"
>
> "The giving of a promissory note in settlement of an account, does not operate as an absolute payment, unless 'the parties expressly or impliedly agree to treat it as such.'"
>
> Brugman vs. McGuire, 32 Ark., 733.

"The acceptance by a creditor of the note or bill of a third party for his debtor's debt does not discharge the debtor, unless so especially agreed by the parties."

Akin vs. Peters, 45 Ark., 313.

"The taking of the note, bill or check of a debtor, or of one of several joint debtors, or of a stranger for the antecedent indebtedness, is no payment, unless it is agreed to be taken as such. It is only conditional payment, dependent on the payment of the paper. If that is dishonored, the original debt revives (citing authorities). Such has been the settled law of England ever since the time of Lord Holt (citing an English case), and such is the law of all the American States, except Massachusetts, Maine, Vermont, Indiana and Louisiana.

"The more recent decisions of this Court are in perfect harmony with this rule." (Citing Brugman vs. McGuire,

supra; Akin vs. Peters, supra, and Malpas vs. Lowenstein, 46 Ark., 552.)

Henry vs. Couly, 48 Ark., 267.

"In the substitution of a new debt or obligation for an old one, which is denominated in the civil law a novation, the intention of the parties to that effect should be positively declared; or at least in whatever manner expressed it should be so evident as not to admit of a doubt; in other words, a novation is not to be presumed unless the intention to that effect evidently appears. Story on Bills, Sec. 441; Burge on Suretyships, 166; Chandler vs. Herrick, 19 Johns, 132."

Cockrill vs. Johnson, 28 Ark., 193.

OPINION OF THE CIRCUIT COURT OF APPEALS.

Reported in 53 C.C.A. at page 14.

Judge Caldwell opens his opinion with the statement that "it is settled by the decision of the Supreme Court of Arkansas in the case of the Nebraska National Bank vs. Walsh, 68 Ark., 21, that the statute on which this action is founded *is a remedial statute* and imposes a statutory liability and not a penalty."

Bouvier (Rawle's Revision) 1032, defines a remedial statute as "one made to supply such defects and abridge such superfluities in the common law as may have been discovered."

Clearly, this definition is not applicable to the statute involved in this suit, but the same author, in the next paragraph, gives one that is. He says: "The term *remedial statute* is also applied to those acts which *give the party injured* a remedy."

I think it is safe to asume that the learned Court of Appeals used the term "remedial statute" in its proper legal sense and signification, and that, therefore, it meant to, and did hold that the statute involved herein was one which gave the injured creditors of an Arkansas corporation a remedy.

Then it must necessarily follow that the liability created by this remedial statute did not become enforceable unless and until the injury occurred. It would seem that no argument is necessary to sustain this proposition, and I shall not so affront appellee's learned counsel as to anticipate any attempt to refute it.

But the learned Judge says, on page 29 of the record, that the defendant's "liability was primary and not secondary," a statement to my mind wholly irreconcileable with the opening remark.

If the liability of the defendant did not become enforceable until injury occurred to the creditor, then it was necessarily postponed until the maturity of the debt and the failure of the debtor to pay. The creditor certainly was not injured until default made by the debtor, and the Court virtually holds in the opening sentence of its opinion that the officer of the corporation could not be sued until such injury.

True, the third paragraph of the opinion contains the statement that it is not essential to determine whether the defendant could have been sued the day after his corporation created the debt, but I submit that the effect of the holding that the statute in question is a remedial one, is to hold the right of action against the defendant accruable only when the creditor is injured, and surely that only occurs upon default of the debtor.

It is said in the concluding sentence of the fourth paragraph of the opinion, that the defendant's "legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank or to any proceedings against it to enforce payment."

This may be entirely true, and still I submit that it was not then enforceable even though it had attached. At the risk of tediousness, I will repeat the illustration used in another portion of this brief, by supposing that the original indebtedness sued for herein had been made payable four years after date.

Then, unless the defendant's liability was unenforceable until the maturity of the note, we would have the strange and anomalous situation of a statute of limitations barring his liability upon a debt *before that debt had matured.*

I do not believe that this Court would hold any such proposition.

Then, if this position be correct, the whole question resolves itself down to the simple point as to whether the renewals constituted the same debt and were but continuations thereof, or whether they were new debts entirely.

The authorities upon this proposition have been heretofore submitted, and further comment upon them will not be made here.

Another view to be taken of the case is in respect of the intention and meaning of the statute. The Legislature evidently intended to furnish indemnity to the creditor, and *to secure the debt.* It would be a poor sort of indemnity which protected the

creditor during a portion of the life of his debt and not longer, and a security for a debt which was survived by the debt itself would be but a farce and a sham.

I do not discuss the third, fourth and fifth subdivisions of the demurrer, the last because it is too general, and the third and fourth because a casual glance at the complaint will show that they have no foundation in fact.

I respectfully submit that the judgments of the lower court and of the Court of Appeals should be reversed and the case remanded back for answer and trial.

RHEA P. CARY,

Attorney for Plaintiff in Error.

Supreme Court of the United States.

October Term, 1903.

No. 343.

CONTINENTAL NATIONAL BANK, OF MEMPHIS, TENN.,
PLAINTIFF IN ERROR,

vs.

G. C. BUFORD.

STATEMENT OF THE CASE.

Plaintiff's complaint analyzed contains the following statements:

First. That the plaintiff is a National Banking Corporation in liquidation.

Second. That the Bank of Mammoth Springs was incorporated October 20th, 1889, under sections 1326 to 1358, inclusive, of Sandells & Hill's Digest, of Arkansas, and became insolvent "some years prior to July 27th, 1897."

Third. That the defendant was president of said Bank of Mammoth Springs from June 9th, 1891, to June 9th, 1896.

Fourth. That on September 6th, 1894, the Bank of Mammoth Springs "*became indebted* to plaintiff in the sum of $2,500.00, *by note* for that amount due November 8th, 1894. That on said date said note was renewed and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20th, 1897, when said Bank of Mammoth Springs being indebted to plaintiff in the sum of $1,150.00, as balance due on said original indebtedness, executed to the plaintiff its note for that amount, due and payable three months after that date, with interest," etc.

Fifth. "That on May 3rd, 1894, said Bank of Mammoth Springs *was also indebted* to the plaintiff in the sum of $5,000.00, *by note* which by the same process of renewals and part payments as above stated in regard to the first note was reduced on May 2nd, 1897, to $3,500.00, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date."

Sixth. "That in the years 1894 to 1897, inclusive, said bank *was likewise indebted* to plaintiff in various sums, at different times *due upon open account. That the balance due on said account June 30th, 1897, was $333.55*, and in April, 1898, when the last entry appears upon said account, the balance was and now is, exclusive of interest, $2,738.05."

Seventh. Copies of the two notes and account are filed with the complaint as exhibits "A," "B," and "C." (But exhibits "A" and "C" contradict the allegations of the complaint in this: Exhibit "A" is a note executed to

H. G. King and endorsed in blank, and not payable to plaintiff as alleged. Exhibit "C" shows an account made in 1897 and 1898, and not in 1894, as alleged.)

Eighth. The following sections of the Arkansas Statute are pleaded:

"*Section* 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the County Clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"*Section* 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"*Section* 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

Ninth. That during the defendant's term of office,—from June 9th, 1891, to June 9th, 1896, he failed to comply with the provisions of this statute.

Tenth. "Plaintiff therefore charges that said defendant is by reason of the foregoing facts, liable to it in this action, *founded upon said statute*, for the amount of the indebtedness due it by said Bank of Mammoth Springs."

This complaint was filed July 21st, 1900, more than three years after the maturity of the original indebtedness, pleaded; and more than three years after the final settlement between the plaintiff and the Bank of Mammoth Springs of all its indebtedness, when exhibits "A" and "B" were given for balances then due the plaintiff as alleged; and more than three years after defendant ceased to be the president of the Bank of Mammoth Springs; and more than two years after the maturity of the last renewal notes.

To this complaint, the defendant interposed the following demurrer:

DEMURRER.

"The defendant demurs to the complaint of the plaintiff for insufficiency, and for cause of demurrer says:

I.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of two years.

II.

That the said complaint shows on its face that the plaintiff's cause of action is barred by the statute of limitation of three years.

III.

That said complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contracted.

IV.

That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest.

V.

Because said complaint does not state facts sufficient to constitute a cause of action."

JUDGMENT.

The Circuit Court sustained said demurrer and the plaintiff prosecuted a writ of error to the United States Court of Appeals, where the judgment of the Circuit Court was affirmed, and from this latter judgment, plaintiff brings error to this court.

The opinion of the Circuit Court is found in the record, pp. 18 to 20 inclusive, and is also reported in Fed. Rep. 188. The opinion of the Court of Appeals is found on pages 27 to 30 of the record, and is reported in 114 Fed. Rep. 290.

BRIEF AND ARGUMENT.

I.

The first ground of demurrer is based on the two year statute of limitation which is as follows:

"All actions upon penal statutes, where the penalty or any part thereof, goes to the state or any county or *person suing for the same*, shall be commenced within *two years after* the offense shall have been committed, *or the cause of action shall have accrued.*" Sandell & Hill's Digest, Sec. 4826.

This ground of demurrer is well taken whether defendant's liability, under the statute pleaded, accrued upon his failure to file the reports, or upon the maturity of the original debt, or upon the maturity of the last of the series of notes given in renewal of said original debt, since the last named notes matured Aug. 20th, 1897, and Aug. 27th, 1897, respectively, and this suit was not filed until July 21st, 1900,—more than two years after the maturity of said renewal notes.

While this court in *Huntington vs. Attrill*, 146 U. S. 657, held a statute making officers of a corporation, who sign and record a false certificate of the amount of its capital stock liable for all its debts, *not to be penal in an international sense*, it did not overrule its prior decisions holding statutes similar to the one under consideration to be penal for other purposes, but said:

"The question whether a statute of one state, which in some aspects may be called penal, *is a penal law* in the *international sense*, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice

of the state, or to afford a private remedy to a person injured by the wrongful act."

There is no conflict between this holding and that announced in *Steam-Engine Company vs. Hubbard*, 101 U. S., 188, where this court was called upon to construe the statute of Connecticut, which, like the Arkansas statute, required the president and secretary of private corporations to file a certificate showing the condition of the affairs of the company, at stated periods. The defenses set up were:

1. That the defendant was never legally elected president.

2. That the debt was not contracted while he was acting as president.

3. That by a proper construction of the statute, he is not liable for the debt sued for.

This court said:

"Preliminary to those inquiries, the defendant contends that the statute upon which the action is brought is penal and should be strictly construed, *in which proposition the court unhesitatingly concurs.* Statutes somewhat similar in character have been passed in several states, in all of which states it is held that the statutes are penal, and that for that reason their provisions must receive a strict construction."

Neither does *Huntington vs. Attrill*, *supra*, overrule *Chase vs. Curtis*, 113 U. S., 452, where this court had under consideration a statute of New York, which makes the trustees of private corporations liable for the debts of the corporation, for the failure of the corporation, through its president and trustees, to file and publish a similar report, and Mr. Justice Mathers at the outset said:

"It is the well settled rule of decision, established by the Court of Appeals of New York in numerous cases, that this section of the statute, to enforce which the present action was brought, is penal in its character, and must be

construed with strictness as against those sought to be subjected to its liabilities."

In *Bank vs. Remsen*, 158 U. S., 337, defendants are sued on a statutory liability for failure to file reports, which provides that the directors and trustees of such corporations "shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." N. Y. Rev. Stats. 8th Ed. Vol. 3, page 1957, and this court said:

"That the statute is one of a penal character is settled, not merely by various decisions of the Court of Appeals of New York, but also expressly by this court in *Chase vs. Curtis*, 113 U. S. 452, though as since held not a penal law in the international sense. *Huntington vs. Attrill*, 146 U. S. 657."

Judge Thompson, in his work on corporations, section 4221, speaking of these statutes says:

"In many of the states there exist statutes, and even constitutional ordinances, requiring the directors or trustees of corporations to make and file, in some designated public office, or publish in some designated manner, at stated periods, reports of the conditions of the affairs of the company. If the directors fail to perform this duty, they are made liable to pay any debts of the company contracted during the period when they are thus in default. These statutes which make an agent liable to pay the debt of his principal in consequence of a mere non-feasance, fall within the class which are deemed penal and to be strictly construed."

In *Brown vs. Clow*, 62 N. E. 1006, the Supreme Court of Indiana, in passing on a statute of that state making the directors of private corporations liable for all debts of the corporation for violating the statute requiring the capital stock of such corporation to be fully paid in within eighteen months from incorporation, held that the action based on

such statute was penal within the meaning of the statute of limitations of that state requiring actions to recover penalties to be brought within two years. Citing *Huntington vs. Attrill, supra; Chase vs. Curtis, supra*, and a number of cases from other states.

In *Chapmam vs. Lynch*, 51 N. E., 275, decided by the New York Court of Appeals, in 1898, defendants were sued as directors of a corporation for failure to file reports required by the New York statute which is substantially like the Arkansas statute, and that court held the statute created a penal liability and that the statute of limitations applicable to penal actions applied. The court cites a large number of prior cases from that state, among which are the cases cited and followed by this court in *Chase vs. Curtis*, and *Steam-Engine Company vs. Hubbard, supra.*

In *Merchants National Bank of Chicago vs. Northwestern Manufacturing Company*, 51 N. W., 117, the Supreme Court of Minnesota held a similar statute penal within the meaning of the statute of limitations of that state and on this point said:

"We have heretofore (*Patterson vs. Stewart*, 41 Minn. 84, 42 N. W. Rep., 926,) referred to this statute—section 142—as highly penal in its nature, having a twofold object: FIRST, to enforce diligence and fidelity on the part of the corporate officers; and, SECOND, to afford a remedy to creditors of the corporation. While this remedial purpose of the law is unquestionable, it is equally plain that the liability imposed is in the nature of a penalty."

In *Gennert vs. Ives*, 61 N. E., 9, the Supreme Court in construing a statute of that state imposing personal liability on directors for failing to make the report required by law, says:

"Statutes imposing liability of the character here sought to be established have been uniformly held to be penal in their nature, and to require strict construction.

Thomp. Liab. Off, 447; *Arms Co. vs. Barlow*, 63 N. Y., 62; *Breitung vs. Lindauer*, 37 Mich., 217. And it is held that the penalty will only be imposed in cases where the plain language of the provisions requires it. *Whitaker vs. Masterton*, 106 N. Y., 277, 12 N. E., 604."

In *Patterson vs. Thompson*, 86 Fed. Rep., 85, the United States Circuit court, for the district of Oregon, construed section 3231, 2 Hill's Ann. Laws Ore., to create a penal liability against the directors of private corporation for declaring dividends in violation of said statute, and also held that the statute of limitations applicable to penal actions applied.

The same rule was announced by the Supreme Court of Montana, in *State Savings Bank of Butte City vs. Johnson*, 45 Pac., 662, construing a similar statute requiring the trustees to file such reports. The liability was held to be penal within the meaning of the one-year statute of limitations applicable to penal actions.

In *Fields vs. Haines*, 28 Fed., 919, in the United States Circuit Court, for district of Vermont, in passing on a statute of that state which prohibited the contracting of debts exceeding two-thirds of the capital stock of corporations, and distinguishing such a statute from those requiring reports to be filed or published as does the Arkansas statute, Wheeler, J., said:

"Where a liability is declared for some act or neglect in no way connected with the contracting of the debt, as for neglecting to file reports, it is undoubtedly penal."

A statute of Colorado requires a report to be filed annually, signed and verified by the president and secretary, showing the condition of affairs of the corporation and provides that "all the directors or trustees of the company shall be jointly and severally liable for all debts of the com-

pany that shall be contracted during the year next preceding the time when such report should be filed."

In *Thatcher vs. Solmon*, 64 Pac., 368, the Court of Appeals of that state construed this statute to be penal.

And in *Hazleton vs. Porter et al*, 67 Pac., 170, the same court held that the one-year statute of limitations to apply, which reads:

"All actions and suits for any penalty or forfeiture of any penal statute brought by this state, or any person to whom the penalty or forfeiture is given in whole or part, shall be commenced within one year next after the offense is committed."

Note, the Arkansas statute adds: "Or cause of action shall have accrued."

See also the following cases holding such and similar statutes to be penal:

Losee vs. Bullard, 79 N. Y., 404;
Knox vs. Baldwin, 80 N. Y., 610;
Duckworth vs. Roach, 81 N. Y., 49;
Rector vs. Vanderbilt, 98 N. Y., 170;
Veeder vs. Baker, 82 N. Y., 156;
Credit Indemnity Co. vs. Elliss, 156 Ind., 212; 59 N. E., 679;
Stokes vs. Stickney, 96 N. Y., 323;
Garrison vs. Howe, 17 N. Y., 458;
Bank vs. Commonwealth, 26 Pa. St., 451;
Gadsden vs. Woodward, 103 N. Y., 242;
Wiles vs. Suydam, 64 N. Y., 173;
Halsey vs. McLean, 12 Allen, 438;
Bank vs. Bliss, 35 N. Y., 412;
Irvin vs. McKeon, 23 Cal., 472;
Bank vs. Price, 33 Md., 487;
Moies vs. Sprague, 9 R. I., 451;

Iron Co. vs. Pierce, 4 Biss. 327 Fed. Cases, No. 14367;
Gregory vs. Bank, 3 Colo., 333;
Breiting vs. Lindaner, 37 Mich., 217;
Stebbins vs. Edmond, 12 Gray, 203;
Derrickson vs. Smith, 26 N. J. L., 166;
Michell vs. Hotchkins, 48 Conn., 9;
Hill vs. Frazier, 22 Pac. St., 320;
Bank vs. Johnson, 45 Pac., 662;
Kritzer vs. Woodson, 19 Mo., 327.

II.

The second ground of demurrer is well taken, whether the liability sought to be enforced against this defendant be regarded as a "penalty" or "statutory liability." See *Nebraska National Bank vs. Walsh*, 59 S. W., 952.

Indeed it is conceded by plaintiff in error that the right of action afforded by the statute on which this suit is based is barred in three years from the time when such right of action accrues. But he contends that his right of action under the statute did not accrue until the maturity of the renewal notes which were executed long after defendant went out of office. Defendant's contention being that the right of action accrued when the debt was contracted, and at all events when the original debt matured.

We are not cited to a single authority by counsel that answers this question—when the right of action given by such statutes accrues, though the books are full of cases on this identical point. To this question the courts have given two answers, either of which defeats the plaintiff's right to recover herein, and either of which sustains the Circuit Court of Appeals, and the trial court.

Some courts hold that the right of action based on statutes with the peculiar wording of the Arkansas statute accrues immediately upon the failure of the officer to comply with the law, or rather contemporaneous with the violation of the law. While other courts hold that the right accrues at the maturity of the debt contracted during such neglect and that the renewal of such debt or extension of the time of payment by the corporation and the creditor, or partial payments by the corporation, does not prevent the running of the statute or stop its running after it commences to do so.

We will call attention to a few authorities which hold that the right of action accrues against the officer immediately upon the violation of the law.

Thompson on Corporation says:

"SECTION 4222. TIME AT WHICH THE DEBT IS DEEMED TO ACCRUE.

"The principal question which relates distinctively to these statutory provisions, and which is not common to all statutes imposing a personal liability upon directors for official defaults, has reference to the time when the debt for which the directors may be charged is deemed to accrue. If there has been a default in making the reports required by such a statute, during a particular year, and during that year a debt is contracted, and during a subsequent year, within which the directors are not in default in making of their reports, a promissory note is given for the debt, it would seem that, for the purposes of the relief afforded the creditor by the statute, the debt ought to be deemed to have accrued from its original inception, and not from the making of the note. And this is obviously the correct view." Citing cases supporting this view.

In *Colorado Fuel & Iron Co. vs. Lenhart et al*, 41 Pac., 834, referred to in the later cases cited above, the Court of Appeals said of such a statute:

"The statute which is invoked is penal in its character. The debt was owing by the rolling-mills company, and not by the defendants. Its amount was recoverable from them as a penalty, and not as an indebtedness. They are therefore entitled to a strict construction of the statute. There are no equities in the plaintiff's favor, as against them. It is entitled to what the letter of the law gives it, and no more. On account of the failure to make the required report, *the defendant's liability attached, and was absolute, immediately upon the contraction of the debt.* The records were open to the plaintiff's inspection, and, if it was without knowledge of what had been done, its ignorance is chargeable to its own negligence. To enable it to recover it must bring itself strictly within the law, and for its failure to do so it alone is responsible. *Larsen vs. James*, 29 Pac., 183."

"This question was under consideration by this court in a case very recently decided. *Thatcher vs. Salomon*, 16 Colo. App., ——, 64 Pac. 369. We there declared the true doctrine to be that a debt is contracted when, in consideration of value received by the corporation a payment is to be made, no matter whether at once or at a future period. When, therefore, in this instance, the corporation failed to make its annual report on March 2, 1891, the directors instantly became liable for the whole of the debt due the plaintiff. At that time a cause of action arose, in favor of the plaintiff and against these defendants, for the collection of this penalty imposed by law. The universal rule is that a statute of limitations begins to run when the right of action which is embraced in its provisions accrues, and the running of the statute is not arrested, except by certain well-recognized circumstances, which there can be no pretense of obtaining in this case, and which is not claimed. No fraud nor concealment is alleged. This court in *Iron Co. vs. Lenhart*, 6 Colo. App., 515, 41 Pac., 835, said, in considering this section: 'When the liability to the penalty is incurred, the creditor's cause of action for its recovery accrues, and the statute is set in motion, and does not stop until the action is commenced or barred.' We do not think

language could be plainer. To the same effect is *Clough vs. Oil Co.*, 25 Colo., 528, 55 Pac., 809, also in a case involving the construction of the same section. The liability of the directors does not arise from any promise to pay, express or implied, or from any contractual relation whatever. The law imposes it upon them as a penalty for an offense committed by them in disobeying its mandates, and the measure of the penalty is the amount of the indebtedness contracted during the preceding year." Said the Colorado Court of Appeals in *Hazelton vs. Porter*, 67 Pac., 170, construing a similar statute."

The same court used the following language in *Thatcher vs. Salomon*, 64 Pac., 370:

"It will be observed that the statute makes the directors liable for the debts of the company that were *contracted* during the year previous to the time when the report should be made, until the default is terminated by the making of the report or by filing the certificate of paid-up capital stock. It says nothing about debts then matured or not matured,—those upon which a cause of action then existed or did not exist. It was sufficient if the debt had been contracted. We think the true rule is very aptly expressed by a New York court in construing that portion of a similar statute wherein identically the same language is used as in the Colorado statute, and is now under consideration: 'The true doctrine is that a debt is contracted when, in consideration of value received by a corporation, a payment is to be made, no matter whether at once or at a future period.' *Vernon vs. Palmer*, 48 N. Y., Super. Ct., 231. This rule is supported by and in accord with all of the New York cases, as we read them.*** In a very recent case, decided only last October, the New York Court of Appeals said: 'The liability is for debts then existing; that is, whether due or not,'—thus expressly recognizing the fact, as do the other cases cited, that the liability of the directors is not dependent upon the maturity of the debt. *Morgan vs. Hedstrom, supra.*"

In *Swan et al vs. Burnham et al*, 49 Atl., 93, the Supreme Court of New Hampshire said of a similar statute:

"No corporation, banks and insurance companies excepted, shall contract debts or incur liabilities exceeding one half the value of its property." Pub. St. c. 150, §4. If, by vote or by its officers a corporation violates this provision, the directors thereby become individually liable, to the amount of the excess, "for the debts and contracts of the corporation then existing or contracted while they remain in office." Id. §5. The effect of these enactments is to impose the liability of the sureties for the corporation upon the directors, to the amount of such excess, as a *penalty* for a violation of these provisions (*Bank vs. Fiske*, 62 N. H., 178, 181), and to give creditors a right of action against the directors to enforce the liability, *independent of their right of action against the corporation.* (*Same vs. Fiske*, 60 N. H., 363, 370.) It is not denied that a cause of action against the directors accrues to existing creditors at the time an indebtedness exceeding one-half the value of the corporate property is *incurred* and, the conditions continuing, to subsequent creditors when their debts are created. But the plaintiffs say that new causes of action accrue to existing creditors whenever the indebtedness of the corporation is increased after the debt limit has been passed. The language of the statute (Pub. St. c. 150 §§4, 5), when taken alone, may be capable of such a construction, but it is not probable that the legislature intended to give to it that meaning. The only apparent purpose of such a provision would be to take causes like those in the present suit out from the operation of the statute of limitations. If such had been the purpose, the legisiature would not have been likely to have left it to be implied, but would have expressed it in terms as definite as those making the directors sureties of the corporation for all indebtedness incurred in excess of one-half of the value of its property. Id. §5. A construction which does not take a cause of action that has once begun to run out of the operation of the statute is in harmony not only with these provisions, but also with the policy of the law, which requires diligence on the part of

the creditors in the enforcement of their claims. It seems more probable than otherwise that the legislature intended that actions of this kind should be begun within six years after the cause of action accrued, and not afterwards. Pub. St. c. 217, §3."

"The fact that the claims of some of the plaintiffs were reduced to judgments against the corporation within six years from the time the debts were contracted is immaterial. It neither prevented the running of the statute against the defendants, nor created an indebtedness that imposed a liability upon them."

In *Cannon vs. Breckinridge Mercantile Company*, 69 Pac., 269, the Colorado Court of Appeals said: "Under the plain reading of the statute,—and it has been repeatedly so held by this court,—a right of action by a creditor against the defaulting directors accrued immediately upon default being made."

"Instantly upon the default being made with reference to filing of the annual report within the time limited, a right of action accrued to the plaintiff against the directors."

The Circuit Court, and the Court of Appeals took a similar view of the statute, but held that it was not necessary to base the decision thereon, since this action was barred even if it did not accrue till the maturity of the original debt, "contracted during such period of neglect."

But the cases are more numerous, which are in accord with the holding of the Circuit Court of Appeals, in the case at bar,—that if "the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect between them." (Opinion of Judge Caldwell, record page 29.)

This construction is the most liberal that can be indulged in favor of the creditor, and at the same time keep in mind a strict construction of this statute, and is fully sustained by the cases cited by Judge Caldwell.

Counsel for plaintiff evidently did not take the trouble to read the cases cited by the Court of Appeals, and subsequent cases from the highest court in New York, else he would not have imposed upon this court the full text of the opinion of Judge Allen, in *Jones vs. Barlow*, which is in direct conflict with all the prior and subsequent decisions in the State of New York, on the question as to when a right of action accrues against directors, trustees, or stockholders, under the various New York statutes.

The opinion of Judge Folger, in *Jones vs. Barlow*, is in full accord with the prior and subsequent cases in that state, and counsel evidently overlooked the statement made by Judge Caldwell to that effect.

Hardman vs. Sage, 124 N. Y., 25, 26 N. E., 354, cited by Judge Caldwell, expressly holds, in accord with the prior opinion of Judge Folger, that the taking of a note which matured beyond the time fixed by the statute did not have the effect of keeping alive defendant's statutory liability. The court said: "If creditors of manufacturing corporations desire to hold its shareholders liable under the tenth section, their claims must become due within a year from the time when contracted, and the period of credit must not be extended by new contracts between the corporation and creditors."

In *Parrott vs. Colby*, 6 Hun., 55, the court said: "We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation." This decision was affirmed on appeal in 71 N. Y., 597; and in *Jagger Iron Co. vs. Walker*, 76 N. Y., 521.

Parrott vs. Colby is cited and substantially the same doctrine announced.

But in still later cases the same doctrine is announced under the statute making the trustees liable for certain defaults, where the court uses the language: "Neither the continuance of the default, nor subsequent omissions on the part of the company to make the report, could, as to the debt in question, either renew the old liability or create a new right of action. The statute operates upon the remedy, and the omission of the creditor to pursue it cannot stop its running. The liability of the trustee was imposed by statute and the benefit and suit therefor are limited to the creditor as the one aggrieved. In such case *when the statute begins to run nothing subsequent will stop it.*"

Trinity Church vs. Vanderbilt, 98 N. Y., 170.

In a still later case in that state, the question arose in this form, the Tenny Company, a corporation, became insolvent and was adjudged a bankrupt, but had entered into a composition with its creditors whereby it executed its notes, due in the future, for all of its indebtedness. And in *Wood vs. Vanderveer, et al, Supreme Court of New York, Appellate Division*, 67 N. Y., Sup. 371, the defendants were sued under the statute as trustees for the debts of the company contracted while they were in default in making the reports required by law. The defense was that the time for the payment of the debts of the company having been extended by the composition notes, that no right of action had accrued against the trustees until the maturity of said notes. The court denies this contention in the following language:

"But it may be said with some plausibility that their liability is in the nature of a penalty, and so the courts have held that it is barred within three years, under the

provisions of subdivision 3 of section 383 of the Code of Civil Procedure, as an action upon a statute for a penalty or a forfeiture. But if that be true, and this be a penal action, the discharge of the corporation from the debts without its payment has no effect upon the right of the plaintiffs to recover from these defendants. *This cause of action is created by the statute. It is operative when the debt becomes payable, and, regarding it as a penal action, the amount of the debt is simply the measure of damages which the plaintiffs are entitled to recover because of the liability imposed upon these persons by the law.* After the debt has become due, the creditors are not limited to an action against the corporation to recover it, nor is it necessary that they should begin such an action unless they see fit to do so. They can at once proceed against the directors, and can only be barred from that action by the payment of the debt by the corporation. Indeed, no reason is seen why they may not at the same time maintain an action against the corporation upon its contract liability, and another against the directors upon their statute liability, although, undoubtedly, if judgments were recovered in both actions, the payment of one would work a satisfaction of the other. But the second action is entirely separate and has no connection with the other, and as the defendants here were not parties to the bankruptcy proceedings, and their liability was not in any way questioned in these proceedings, it is clear that in the discharge of the bankrupt, which affected it only, and was personal to it alone, can have no effect whatever upon the right of the plaintiffs to recover against another person, whose *liability for this debt is created by statute, and is entirely independent and separate from the cause of action against the company.*

In a still later case the New York Court of Appeals fully answered this question in language that fully sustains the dissenting opinion of Judge Folger, in *Jones vs. Barlow*, and also sustains the statement of Judge Caldwell that the latter case is not in line with the latest decisions in that state. In *Chapman vs. Lynch*, 51 N. E., 275, decided by

the New York Court of Appeals in 1898, "action is sought to be maintained against the defendant upon the ground that he was a director of the corporation, and as such in company with his associates, had failed to file the annual report required by the statute during the years 1881 to 1888, inclusive."

"It must be remembered," said the court, "that this action is prosecuted to recover a penalty. The action having once accrued and the statute run against it, the bar becomes complete, notwithstanding the subsequent defaults of the defendant and his associates in filing the annual reports called for by the statute. *Neither do we understand that subsequent partial payments by the corporation upon the account affect the running of the statute; they may, as to the corporation under its contracts to pay, but cannot operate to extend the liability of the defendant for the penalty incurred by him. Rector, etc. vs. Vanderbilt*, 98 N. Y., 170–175; *Loose vs. Bullard*, 79 N. Y., 404.

"Nor do we think that the crediting of the interest upon the account semi-annually, affects the liability of the defendant. The cause of action having once accrued, and the defendant having become liable for the penalty, the statute commenced to run, and was not stopped by either credits of payments or the charges of interest accrued thereafter made by the company."

Turning now to the California case, also cited by Judge Caldwell, we find the same rule announced.

In *Mokelunne Hill Canal Co. vs. Woodburry*, 14 Cal., 265, Justice Cope says: "It seems from a just and reasonable construction of the constitutional and statutory provisions upon this subject that an individual corporator, in respect to his personal liability for the debt of the corporation, does not occupy the position of a *surety* but that of a *principal* debtor."

"It is *not in any sense contingent* but it is declared to be *absolute and unconditional.*" This case is quoted and

followed in *Davidson vs. Rankin*, 34 Cal., 503. These cases are also cited and followed in the later case of *Hyman vs. Coleman*, 82 Cal., 650, 16 Am. St., 178. This latter case is cited by Judge Caldwell, and so fully sustains his views that we give it in full on this point.

"This is an action to recover from the defendants as stockholders of a corporation, their several proportions of an indebtedness due plaintiff from the corporation."

"The complaint contains two counts. In the first it is alleged that plaintiff advanced and loaned to the corporation, on the seventh day of October, 1879, the sum of two thousand dollars, for which the corporation then and there executed to plaintiff its promissory note, payable in one year after date, with interest, and that '*said promissory note was renewed by said corporation each year by the surrender of all former notes given by said corporation to plaintiff, and the execution and delivery of new notes to plaintiff for the amounts due upon said indebtedness.*' It further alleges that the capital stock of the corporation was divided into one thousand shares, and states the number of shares owned by each defendant on the 7th of October, 1879."

"The second count alleges another loan by plaintiff to the corporation of one thousand dollars, on the sixteenth day of December, 1879, and the execution of its promissory note for that sum, payable one year after its date, with interest, *and a like surrender and yearly renewal of the same by the corporation.* It further states the number of shares of the capital stock of the corporation owned by each defendant on the last-named date."

"The complaint then alleges that on the eighth day of September, 1883, an accounting as to the amount of the aforesaid indebtedness was had between the corporation and plaintiff, and that plaintiff then surrendered the notes which he held, and the corporation executed to him for such indebtedness four new notes, dated December 16, 1883, and payable one year after date, with interest.

"This action was commenced in April, 1885, and is based upon three of the last-named notes, one of the four having been paid. The defendant demurred to the com-

plaint upon the ground that it did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by the statute of limitations.

"The court sustained the demurrer, and rendered judgment for defendants, and the plaintiff appealed.

"It is not claimed that the renewals of its notes by the corporation created any new debt or liability against the defendants, and it is clear that if the renewals had had the effect to extinguish the old debt, and create a new one, then the complaint stated no cause of action, for the reason that it did not allege that the defendants were stockholders of the corporation when any of the renewals were made. *The only question then is, did the renewals operate to extend the time of payment of the original indebtedness, and thereby prevent the statute of limitations from beginning to run in favor of those who were stockholders when that indebtedness accrued until the last notes matured, on the 16th of December, 1884?*

"It is settled law in this state that, under our constitution and statutes, each stockholder of a corporation is liable for his portion of the corporate debts *contracted* while he was a stockholder, as a *principal debtor*, and not as a surety: *Mokelunne Hill Canal vs. Woodbury*, 14 Cal., 265, 73 Am. Dec., 658; *Neilson vs. Crawford*, 52 Cal., 248; *Sonoma Valley Ban vs. Hill*, 59 Cal., 107; *Morrow vs. Superior Court*, 34 Cal., 383.

"The liability commences and a right of action accrues against the corporation and stockholders at the same time: *Davidson vs. Rankin*, 34 Cal., 503; *Mitchell vs. Beckman*, 64 Cal., 117.

"Suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders: *Young vs. Rosenbaum*, 39 Cal., 646.

"A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders: *Larracee vs. Baldwin*, 35 Cal., 168; *Stephen vs. Ware*, 45 Cal., 110.

"The liability of stockholders is created by statute, and an action to enforce that liability must be brought within

three years after the cause of action accrues: *Code Civ. Proc.*, Secs. 338, subd. 1, and 359; *Green vs. Beckman*, 59 Cal., 545; *Moore vs. Boyd*, 74 Cal., 167.

"In New York it has been held that the renewal of a note by a corporation does not extend the time prescribed by the statute for suing a stockholder. In *Parrott vs. Colby*, 6 Hun., 55, the court said: 'We think the liability of stockholders in such cases cannot be revived or extended by any renewal or extension of the indebtedness which the creditors may make with the corporation.' This decision was affirmed on appeal in 71 N. Y., 597; and in *Jagger Iron Co. vs. Walker*, 76 N. Y., 521; *Parrott vs. Colby* is cited, and substantially the same doctrine announced.

"In view of the foregoing authorities, our conclusion is, that the plaintiff's right of action against the defendants commenced when his first notes matured, and was barred in three years thereafter."

In the still later case of *Redington vs. Cornwell*, 90 Cal., 63, the court in speaking of the effect of an open current account to keep alive this statutory liability of a stockholder, said:

"The averment as to the mutual open account in the third amended complaint is of doubtful sufficiency to extend the period of limitation even against the corporation. As to the stockholders, it can have no effect whatever even though sufficiently alleged. *The corporation had no more power to extend the period of limitation as against the stockholders by a mutual open account than by making its promissory note.* The liability of the stockholders is created and exists by statute. It arises when a debt is contracted by the corporation. It is limited to three years from the time it arises; and it is well settled in this state that the corporation has no power to extend that limitation without direct authority from the stockholders."

Again in *Hunt vs. Ward*, 99 Cal., 612, 37 Am. Sr., 87, the same rule is announced.

In *Swan et al vs. Burnham et al*, 49 Atl., 93, *supra*: "The fact that the claims of some of the plaintiffs were re-

duced to judgments against the corporation within six years from the time the debts were contracted is immaterial. It neither prevented the running of the statute against the defendants, nor created an indebtedness that imposed a liability upon them."

If additional authority is needed to sustain the opinion of the Circuit Court of Appeals, and as a complete answer to the doctrine of *Jones vs. Barlow*, it is found in the decision of the United States Circuit Court for the District of Oregon, 86 Fed. Rep., 85, where Judge Gilbert disposes of the question in the following language:

"Counsel for plaintiff contend that by the decision in *Huntington vs. Attrill*, 146 U. S., 657, 13 Sup. Ct., 224, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on a careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal, in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of *Bank vs. Remsen*, 158 U. S., 337, 15 Sup. Ct., 891, it was again ruled that such a statute is one of a penal character, and in the opinion of the court remarked that the purport of the decision in *Huntington vs. Attrill* was that such a statute was not 'penal law in the international sense.'

"The action being for a penalty, and subject to be barred at the end of three years, *the question next arises, at what date did the statute of limitations begin to run?* The statutory liability of the directors is joint and several for all the debts of the corporation 'then existing or incurred while they remain in office.' It is contended on behalf of the defendant that the statute began to run from the date when the illegal dividend was declared, notwithstanding that the debt was not then due. So far as the question appears to have been adjudicated in other states, it is held that no cause of action accrues against the directors until the debt of the corporation is due. *Sullivan vs. Manufac-*

turing Co., 20 S. C., 79. *Woolverton vs. Taylor*, 132 Ill., 197, 23 N. E., 1007. But it is unnecessary to decide that question in the present case. Assuming that the cause of action against the defendant did not accrue until the debt became due, on February 11, 1894, it still appears that more than three years had intervened, when, on October 27, 1897, this action was commenced. *It is plain that the action was barred, therefore, unless the statute of limitations was suspended either by the agreement of April 10, 1894, extending the time of payment of the debt, or by the payment of $485.91 on account September 15, 1897.*

"Did the agreement between the plaintiff and the corporation, whereby the time of payment of plaintiff's deposit was extended, operate to toll the statute of limitations, which had begun to run in favor of the directors? But little light upon this question is afforded by the decisions of other courts. In *Jones vs. Barlow*, 62 N. Y., 202, in an action brought to enforce the statutory liability of directors for failure to file an annual report in January, 1871, as required by law, it appeared that during the year 1871 the plaintiff sold to the corporation goods for which, on December 26, 1871, it was indebted to him in the sum of $6,292.78, for which it gave him its notes due and payable on June 6, 1872. On that date ten new notes were given, maturing at successive intervals. The action was commenced against the trustees to enforce their statutory liability, on February 7, 1873, before the last three notes were due. It was held that the plaintiff was not entitled to recover on the three notes that had not yet matured. The court said:

" 'Whatever limitations and conditions attach to the corporate and primary obligation, whether attaching to it at its inception or growing out of subsequent lawful agreement of the parties, necessarily limit and qualify the liability of the trustees.'

"It is contended by the defendant that the statute of limitations was not necessarily under consideration in that case. It is apparent, however, that the principal on which the statute is to be applied was directly involved. The court decided that the plaintiff was bound by the contract of the corporation extending the time of payment of the debt,

and that he had no cause of action until that time expired. In that case, as in the case at bar, the debt had matured, and a cause of action had arisin before the execution of the new notes and the extension of the time of payment. The new notes so taken were not evidence of a new contract or a newly-created liability. They were but the means of postponing the time of payment. But in the case of *Blake vs. Clausen*, 38 N. Y. Supp., 514, *decided in 1896*, the Supreme Court of New York denied that *Jones vs. Barlow* was authority for the proposition which is here contended for by the plaintiff, expressing the view that the 'statute of limitations was in no manner involved' in that decision, and held that in a case similar to the case at bar the statute began to run from the moment when the debt became due and a cause of action accrued, and that the operation of the statute could not be suspended by renewals or extensions granted without the knowledge or consent of the trustee sought to be charged. There is no direct intimation in the opinion that the ruling would have been otherwise if a trustee had consented to the extension. On appeal to the appellate division of that court, the decision was affirmed upon the ground that the statute of limitations began to run from the moment when the note fell due, and that, when a cause of action accrued and the statute began to run, no subsequent agreement between the corporation and the creditor could suspend its operation. *Blake vs. Clausen* (Sup.) 41 N. Y. Supp., 772. Opposed to the case of *Jones vs. Barlow*, and, as I hold, expressing the correct doctrine, are the cases of *Bassett vs. Hotel Co.*, 47 Vt., 314, and *Sullivan vs. Manufacturing Co.*, 20 S. C., 79. In *Bassett vs. Hotel Co.*, it was held that the statutory right of action against directors accrued when the debt was contracted and that the statute then began to run, and that a judgment thereafter recovered against the corporation did not operate to suspend it. In *Sullivan vs. Manufacturing Co.*, it was held that the personal liability of the directors, resulting from their failure to perform certain duties, arose at the time of such failure; that the statute of limitations then began to run; and that a subsequent renewal of the debt, by giving a new note therefor, did not suspend its operation. In harmony

with these cases are certain decisions applying the statute of limitations to actions against directors for their failure to file reports as required by statute. Thus, it is held that, where a corporation fails to made its annual report, its trustees at once become indivieually liable for its debts, and that the statute of limitations thereupon begins to run in favor of all debts then due, and that subsequent defaults in making annual settlements do not renew such causes of action, notwithstanding that the statute attaches the liability both to the debts existing when the default is made and to those contracted thereafter until the report is filed. *Lowee vs. Bullard*, 79 N. Y., 404; *Rector, etc. vs. Vanderbilt*, 98 N. Y., 170; *Bank vs. Johnson*, (Mont.) 45 Pac., 662."

In this connection the reasoning of Judge Caldwell is appropriate:

"At the time when the first renewal notes were taken the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action and so was the bank. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debts by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt it unquestionably did on its maturity, and the statute having once commenced to run could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in

the opinion of Judge Folger in *Jones vs. Barlow*, 62 N. Y., 202, 213, and have in substance adopted its reasoning; it seems to have been followed in later cases in that state (*Hardman vs. Sage*, 124 N. Y., 25; *Parrott vs. Colby*, 6 Hun., 55, *affirmed on appeal in* 71 N. Y., 597; *Jagger Iron Co. vs. Walker*, 76 N. Y., 521), and elsewhere—*Mokelunne Hill Canal Co. vs. Woodbury*, 14 Cal., 265; *Davidson vs. Randen*, 34 Cal., 503; *Hyman vs. Coleman*, 82 Cal., 650; *Young vs. Rosenbaum*, 39 Cal., 646."

"The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred and for that portion of the account contracted after he ceased to be president, he never was liable."

III.

Counsel for plaintiff in error disposes of the third, fourth and fifth grounds of the demurrer with this statement:

"I do not discuss the third, fourth and fifth subdivisions of the demurrer, the last because it is too general, and the third and fourth because a casual glance at the complaint will show that they have no foundation in fact."

In this connection we wish to remark that there is equally as much, if not more merit, in these assignments than there appears to be in that portion of plaintiff's complaint, which is bottomed on the open account, which shows on its face to have been made long after defendant went out of office, and which has been urged in the lower court and is now urged in this court with the same earnestness that characterizes the counsel's argument on the promissory notes.

We are, however, unwilling to admit that these grounds of demurrer are not well taken.

The third assignment is:

"That the complaint does not allege that defendant was president of the Bank of Mammoth Springs when the debt sued for was contradted."

If it is true that the complaint fails to allege this material matter, certainly under the statute, section 1347, *supra*, there would be a failure to allege a cause of action.

As to the first note it is alleged: "That on September 6th, 1894, said Bank of Mammoth Springs *became indebted* to plaintiff *** by note." We contend that these words "became indebted" do not amount to an allegation that the bank on that date *contracted* the debt.

But the language of the complaint as to the second note is still more indefinite: "That on May 3rd, 1894, said Bank of Mammoth Springs *was also indebted* *** by note." While as to the open account the allegation is: "That in the years 1894 to 1897, inclusive, said bank *was likewise indebted* to plaintiff in various sums, at different times due upon open account."

It is alleged that defendant was president of the bank from June 9th, 1891, to June 9th, 1896, and we contend that there is no allegation that the debts sued for were "contracted" between these two dates. The clear language of the statute is that the president shall be liable for debts "contracted during the period of any such neglect or refusal." For aught that appears the debt evidenced by these notes might have been contracted years before defendant was president. If it be argued that the words "became indebted," are synonymous with the statutory word "contracted," what can be urged in defense of the words "was indebted," used with reference to the second note and the open account?

This court fully considered the question of pleadings and proof under a similar statute against trustees in the case of *Chase vs. Curtis, supra*, and we submit that the allegations as to when these debts were contracted do not come up to the standard there laid down, and which is supported by all the cases.

In *Whitney Arms Co. vs. Barlow*, 63 N. Y., 62, cited with approval by this court in *Chase vs. Curtis, supra*, it is said: "The facts upon which the debts are founded, must be proved." It follows, of course, that such facts should be alleged.

The fourth ground of demurrer is:

"That said complaint does not allege that the debts sued for were contracted during the period of defendant's neglect or refusal to file the certificate required by section 1337 of the Digest."

The case of *Chase vs. Curtis, supra*, and cases cited are also in point in support of this ground of demurrer.

In *Brown vs. Clow*, 62 N. E., 1006, the Supreme Court of Indiana speaking of the sufficiency of the proof of the indebtedness for which directors are liable for failure to comply with the law said:

"Among the reasons for a new trial is the objection that the amount of the recovery was too large. The court took the judgment rendered in favor of the appellees against the corporation in the action upon their claim as the basis of the liability of the directors and assessed the recovery in the present action at the amount of that judgment and interest thereon. In this, it seems, the court fell in error. The liability of the delinquent directors, as fixed by the statute, is limited to the amounts of debts contracted by the corporation after the wrongful act of the directors which caused the insolvency of the company. By this must be under-

stood the sums for which the insolvent corporation orinally became indebted. It has been held in similar cases that, where a judgment has been recovered against a corporation for the debt, such judgment is not admissable to establish the debt, but that proof must be made of the transaction out of which the indebtedness arose. *Chase vs. Curtis*, 113 U. S., 452, 5 Sup. Ct., 554, 28 L. Ed., 1038; *Miller vs. White*, 50 N. Y., 137; *Esmond vs. Bullard*, 16 Hun., 65; *Kraft vs. Coykendall*, 34 Hun.

The fifth ground of demurrer, which counsel criticises as "too general to be considered," is:

"Because said complaint does not state facts sufficient to constitute a cause of action."

The third and fourth grounds might be treated as specifications under this last assignment, and what we have said with reference to them applies here. But the complaint fails to state a cause of action in favor of *this plaintiff* and *against this defendant*, for other reasons than those already pointed out. It is sought to bring the defendant within the provisions of the Statute of Arkansas, by the following allegations:

"That said Bank of Mammoth Springs was incorporated and organized under the provisions of the law as set forth in sections 1326 to 1358 inclusive, of said Digest, and therefore subject to all its terms."

Sections 1326 to 1358, inclusive, cover the entire act of April 12th, 1869, which relate to manufacturing and other business corporations. Section 1326, which is the first section of the act, enumerates the purposes for which private corporations under this act may be organized:

"Section 1326. Any number of persons, not less than three, who, by articles of agreement in writing, have associated, or shall associate, according to the provisions of this

act, under any name assumed by them, for the purpose of engaging in or carrying on any kind of *manufacturing, mechanical, mining, or other lawful business* and who shall comply with all the provisions of this act, shall, with their successors or assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association."

The word "bank" nowhere appears in this act, neither is the officer, "cashier," anywhere mentioned. Unless the words "*or other lawful business*" include banks, and was intended by the legislature to include banks, then section 1347, on which this action is based, does not apply to the president of a bank and the defendant would not be liable in this action.

Are banks *ejusdem generis* with manufacturing, mechanical and mining companies?

Statutes, constitutions, and written instruments fall under that "good rule of construction," which requires that "where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class." Broom's Leg. Max. (6 Am. Ed.) s. p. 625.

We will impose upon this court some of the "wise saws and modern instances" illustrating this "good old" rule:

"Thus in *Reg. vs. Whitnash*, 7 Barn. & C., 596, Stat. Car. II., chapter 7, section 1, provided, 'that no tradesman, artificer, workman, laborer, or other person whatsoever' should exercise his ordinary calling on the Lord's day. And thereupon it was ruled that the words 'other person' did not include a *farmer*, because not of like denominations with those specifically mentioned; BAYLEY, J., remarking that if all persons were meant, there would be no need of the specific enumeration."

"So in Exparte HILL, 3 C. & P., 225, under the common law rule that where general words follow particular and specific words, the former must be confined to things of the same kind, it was ruled that a 'bull' was not included under the words 'other cattle,' as used in a statute which made it indictable for any person to 'wantonly and cruelly beat, abuse, or ill treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle,' the court saying: 'Horse, mare, and gelding are one class; ox, cow, heifer, and steer are another class; and *** the bull is not included in this act.' "

"*Sandiman vs. Breach*, 7 B. & C., 96, was an action of assumpsit brought to recover the expenses of hiring a postchaise, the defendant having failed to convey plaintiff in his stagecoach as he had contracted to do. For the defense it was contended that the contract was illegal, because it was to be performed on the Sabbath. Lord Tendeden did not approve this contention and in delivering the unanimous opinion of the court of queen's bench said:

" 'It was objected that the plaintiff in this case could not recover, because the contract, for the breach of which the action was brought, was to have been performed on the Sabbath day, and that it could not legally be performed on that day. But upon looking into the statutes (3 Car. 1, chap. 1, and 29 Car. 2, chap. 7), upon which the objection was founded, we are of the opinion that this case does not come within them. *** By the first of these, the 3 Car. 1, chapter 1, it was enacted that "no carrier with any horse, nor wagon-man with any wagon, nor cartman with any cart, nor wainman with any wain, nor drover with any cattle, shall by themselves, or any other, travel on the Lord's day;" and by the 29 Car. 2, chap. 7, that "no tradesman, artificer, workman, laborer or other person or persons, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day." It was contended that under the words "other person or persons" the drivers of stagecoaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. Considering then, that in the 3 Car. 1, chapter 1, carriers of a certain descrip-

tion are mentioned, and that in the 29 Car. 2, chapter 7, drovers, horse-coursers, wagoners, and travelers of certain descriptions, are specifically mentioned, we think that the words or other person or persons cannot have been used in a sense large enough to include owner and the driver of a stagecoach.' "

"That case was approvingly cited and followed in *St. Louis vs. Laughlin*, 49 Mo., 559, where a question arose as to whether a license tax could be imposed on the profession of a lawyer. The charter under which the city authorities proceeded in imposing the tax, provided as follows: 'The mayor and city council shall have power within the city, by ordinance not inconsistent with any laws of this state, to license, tax, and regulate auctioneers, grocers, merchants, retailers, hotels, boarding houses, tenement houses, office buildings, public halls, public grounds, concerts, photographers, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, horse and cattle dealers, beerhouses, patentright dealers, inspectors and gaugers, stockyard proprietors, examiners of titles, conveyancers, mercantile agents, insurance companies, banking or other corporations or institutions, street railroad cars, hackney carriages or omnibuses, carts, drays, and all other carriages, and all other business, trades, avocations, or professions whatever.' And it was held, following the ruling in the case just previously cited, that the city had no power to impose a license tax on a lawyer, notwithstanding the charter as quoted, concludes with the words '*all other business, trades, avocations, or professions whatever.*' "

There is still another reason why the complaint fails to state a cause of action in favor of this plaintiff. The statute invoked makes the president and secretary of private corporations, of the class named, jointly and severally liable for *all debts contracted druing the period of such neglect or refusal to file the certificate required*, and the question which confronts the plaintiff at the threshold of this law-suit is

this: Can the plaintiff maintain this action in his own name for his own use, exclusively, without allegation that he is the only creditor whose debt was contracted during the same period of neglect? In other words, the plaintiff alleges that the Bank of Mammoth Springs is insolvent, and he seeks to hold the defendant liable on the assumption that the debts sued for were "contracted" while the defendant was president of the bank in default in filing the financial statement required by law. Now suppose there are other creditors, similarly situated, and it is reasonable to assume that there are, if the bank is insolvent, can the plaintiff sue and possibly exhaust this asset, the defendant's liability, to satisfy his individual claims and leave the other creditors without relief?

If an individual creditor can in any event sue in his own right to recover his own debt under this statute, we think that he should allege as a condition precedent that there are no other creditors similarly situated. But the authorities are against the right of one creditor to maintain an action at law for his separate debt against defaulting officers of corporations under statutes like these.

The case of *Stone vs. Chisolm*, 113 U. S., 302, was based on a statute of South Carolina, making the directors liable where they consent to the making of the debts in excess of the capital stock of the company, and this court said:

"The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest and apportionment, which, in case there cannot be satisfaction for all, can only be made in a single proceeding to which all interested can be made parties."

"The case cannot be distinguished from that of *Homer vs. Henning*, 93 U. S., 228, the reasoning and result in which we affirm."

"It is immaterial that in the present case it does not appear that there are other creditors than the plaintiff in error. There can be but one rule for construing the section, whether the creditors be one or many."

And it was held that a suit in equity is the proper remedy in the courts of the United States to enforce the statutory liability of directors to a creditor of a corporation by reason of the debts of a corporation being in excess of the capital stock, and that an action at law by a single creditor would not lie.

In conclusion, we submit that the judgment of the Circuit Court of Appeals sustaining the demurrer herein should be affirmed.

W. J. ORR,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 60.—October Term, 1903.

Continental National Bank of Memphis, Tennesse, Plaintiff in Error, *vs.* G. C. Buford. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 16th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

Has this court authority to review the judgment of the Circuit Court of Appeals in this case?

This question arises upon the face of the record, and cannot be ignored; for, the rule is well established that, "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes." *M. C. & L. M. Railway Co.* v. *Swan*, 111 *U. S.* 379, 382; *King Bridge Co.* v. *Otoe County*, 120 *U. S.* 225; *Martin* v. *Balt. & Ohio R. R. Co.*, 151 *U. S.* 673, 690; *Powers* v. *Chesapeake & Ohio Railway*, 169 *U. S.* 92, 98; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 *U. S.* 449, 453.

The plaintiff in error, plaintiff below—the Continental National Bank, organized under the acts of Congress, and located for purposes of business at Memphis, Tennessee—alleged in its complaint that the Bank of Mammoth Springs, an Arkansas corporation, was indebted to it in a named sum, and it sought by this action to hold the defendant liable for the amount of such debt.

The action was based upon certain sections of the Statutes of Arkansas, (*Sandels & Hill's Digest*,) as follows:

"§ 1337. The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the 1st day of January or of July next preceding the time of making such certificate, in the following particulars, viz: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"§ 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts he shall be deemed guilty of perjury, and be punished accordingly.

"§ 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the person so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of any such neglect or refusal."

The complaint alleged that during the entire period of his term of office as President of the Bank of Mammoth Springs, that is, from June 9th 1891 to June 9th 1896, the defendant Buford "wholly neglected to comply with the provisions and perform the duties required of him by said sections 1337 and 1346, by making, swearing to and causing to be filed the statement or certificate required thereby."

The defendant demurred to the complaint on various grounds, one being that the plaintiff's action appeared to be barred by the statute of limitations of Arkansas. The Circuit Court sustained the demurrer, it being of opinion that the complaint did not show any cause of action; also, that a suit for the debt in question was barred by the statute of limitations of Arkansas. The plaintiff declining to amend, the suit was dismissed. That judgment was affirmed by the Circuit Court of Appeals, 114 *Fed. Rep.* 290, and from that judgment the present writ of error was prosecuted.

By the very terms of the Judiciary Act of March 3d 1891, 26 *Stat.* 826, *c.* 517, the judgment of a Circuit Court of Appeals of the United States is final where the jurisdiction of the Circuit Court depended *entirely* upon the diverse citizenship of the parties. No ground whatever of jurisdiction in the Circuit Court appears in the complaint or elsewhere in the record, other than diversity in the citizenship of the parties, unless it can be said that by reason alone of the plaintiff bank having been organized under an act of Congress the suit is one arising under the laws of the United States. This, however, could not be said of the present suit, if regard be had to the acts of Congress defining and regulating the jurisdiction of the courts of the United States.

The Judiciary Act of March 3d 1875, for the first time, invested the Circuit Courts of the United States, without reference to the citizenship of the parties, with original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in dispute exceeded a prescribed sum, *and* the suit was one "arising under the Constitution or laws of the United States." Referring to that statute, this court, in *Petri* v. *Commercial Bank*, 142 *U. S.* 644, 648, said: "Suits by or against national

banks might therefore be brought or removed upon the ground of diverse citizenship, or of subject matter, since as they were created by Congress, and could acquire no right, make no contract and bring no suit, which was not authorized by a law of the United States, a suit by or against them was necessarily a suit arising under the laws of the United States. *Osborn* v. *Bank of the United States*, 9 *Wheat.* 738; *Leather Manufacturers' Bank* v. *Cooper*, 120 *U. S.* 778; *Pacific Railroad Removal Cases*, 115 *U. S.* 1. And of course national banks, as well as state banks and individuals, might bring or remove suits otherwise arising under the Constitution, laws or treaties of the United States."

But, in respect of national bank associations, a radical change was introduced by subsequent acts of Congress.

By the act of July 12th 1882, *c.* 290, it was provided: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business, where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed." 22 *Stat.* 162. Then came the Judiciary Act of March 3d 1887, corrected by the act of August 13th 1888, *c.* 866, and providing: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 25 *Stat.* 433.

The necessary effect of this legislation was to make national banks, for purposes of suing and being sued in the Circuit Courts of the United States, citizens of the States in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the Circuit Courts of the United States simply upon the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result. Of course, notwithstanding the acts of 1882 and 1888, there remained to a national bank, independently of its Federal origin, and as a citizen of the State in which it was located, the right to invoke the original jurisdiction of the Circuit

Courts in any suit involving the required amount, and which, by reason of its subject matter, and not by reason simply of the Federal origin of the bank, was a suit arising under the Constitution or laws of the United States. *Petri* v. *Commercial Bank*, 142 *U. S.* 644, 648. Treating the plaintiff as a citizen of Tennessee, its right to sue the defendant in the Federal court, sitting in Arkansas, was beyond dispute. But, as already suggested, it did not assert any right, privilege or immunity that was dependent in any degree upon the Constitution or laws of the United States. As jurisdiction could not arise merely from the Federal origin of the plaintiff bank, and as no Federal question was involved in the suit, it must be taken that the only ground of jurisdiction in the Circuit Court was the diverse citizenship of the parties. If, apart from the fact that the plaintiff bank was a Federal corporation, the suit had been one arising under the Constitution or laws of the United States, it could not have been said that the jurisdiction of the Circuit Court depended entirely upon diverse citizenship of the parties. But as no Federal questions, upon which the suit depended, are presented by the record, the judgment of the Circuit Court of Appeals in this case was final and, therefore, not subject to review by this court.

What we have said is, we think, required by the decision in *Ex parte Jones*, 164 *U. S.* 691. It appeared in that case that a judgment for money was recovered in the Circuit Court of the United States for the District of Massachusetts. Its amount was paid and subsequently deposited in a national bank. The bank having refused to pay over the money, suit was brought against it. The suit was dismissed by the Circuit Court and the judgment of dismissal was affirmed by the Circuit Court of Appeals. The latter court having refused to allow an appeal upon the ground that an appeal was not given by the statute, proceedings by mandamus were instituted to compel it to do so. After referring to the clause in the Judiciary Act of 1888, declaring that national banking associations should be deemed citizens of the States in which they were respectively located, and that the Circuit and District Courts should not have jurisdiction, other than such as they would have in cases between individual citizens of the same States, the court said: "In *Leather Mfrs. Bank* v. *Cooper*, 120 *U. S.* 778, it was held by this court that, under the act of 1882, which was similar in its terms, [to that of 1888] an action against a national bank could not be removed to the Federal court, 'unless a similar suit could be entertained by the same court by or against a State bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was, by that statute, placed before the law in this respect the same as a bank not organized under the laws of the United States.' . . In this case the

original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. . . The petition for mandamus must be denied." Of course, that suit would not have been so regarded, and the petition would have been granted, if the Federal origin of the bank had been itself ground of jurisdiction, independently of the diverse citizenship of the parties.

For the reasons stated, the writ of error must be dismissed for want of jurisdiction in this court to review the final order of the Circuit Court of Appeals.

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.